DOCKET

No. 87-1704-CFX
Status: GRANTED

Title: John O. Marsh, Jr., Secretary of the Army, et al., Petitioners
v.
Oregon Natural Resources Council, et al.

Docketed:
April 14, 1988

Court: United States Court of Appeals for the Ninth Circuit

Vide:
87-1703

Counsel for petitioner: Solicitor General

Counsel for respondent: Kagan, Nail S.

November 24, 1987 -Op. amended.

Entry	Date	Note	Proceedings and Orders
1	Feb 17 1988		Application for extension of time to file petition and order granting same until March 30, 1988 (O'Connor, February 18, 1988).
2	Mar 18 1988		Application for further extension of time to file petition and order granting same until April 14, 1988 (O'Connor, March 23, 1988).
3	Apr 14 1988	G	Petition for writ of certiorari filed.
4	May 18 1988		Brief of respondents Oregon Natural Resources Council, et al. in opposition filed.
5	Jun 7 1988		DISTRIBUTED. June 23, 1988
6	Jun 9 1988	X	Reply brief of petitioner John D. Marsh, Secretary of the Army, et al. filed.
7	Jun 27 1988		Petition GRANTED. The case is consolidated with 87-1703, and a total of one hour is allotted for oral argument.
			**********
8	Aug 3 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
10	Aug 3 1988		Order extending time to file brief of petitioner on the merits until September 10, 1988.
11	Aug 10 1988	G	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae filed.
12	Sep 2 1988		Record filed.
		*	Certified copy of original record and proceedings, 4 volumes, received.
13	Sep 9 1988		Brief amicus curiae of Institute of Law and Public Health Protection filed. VIDED.
14	Sep 9 1988		Brief amici curiae of Northwest Forest Resource Council, et al. filed.
19	Sep 9 1988		Order extending time to file brief of petitioner on the merits until September 13, 1988.
15	Sep 13 1988		Brief of petitioners John O. Marsh, Secretary of the Army, et al. filed.
22	Oct 1 1988	D	Motion of respondents Oregon Natural Resources Council, et al. for divided argument filed.
20	Oct 3 1988		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
21	Oct 3 1988		Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae GRANTED.
23	Oct 11 1988		Motion of respondents Oregon Natural Resources Council,

No. 87-1704-CFX

Entry	Date	Note	Proceedings and Orders
			et al. for divided argument DENIED.
24	Oct 24 1988		SET FOR ARGUMENT. Monday, January 9, 1989. This case is consolidated with 87-1703. (1st case) (1 hr.)
25	Nov 14 1988		Brief amicus curiae of Center for Environmental Education filed. VIDED.
26	Nov 14 1988		Brief amicus curiae of International Association of Fish and Wildlife Agencies filed. VIDED.
27	Nov 14 1988		Brief amici curiae of California, et al. filed. VIDED.
28	Nov 14 1988		Brief amicus curiae of Environmental Defense Fund, et al. filed.
29	Nov 14 1988		Brief of respondents Oregon Natural Resources Council, et al. filed.
30	Nov 22 1988		CIRCULATED.
31	Dec 14 1988	X	Reply brief of petitioner John O. Marsh, Secretary of the Army, et al. filed.
32	Jan 9 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-1704
No.

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

OREGON NATURAL RESOURCES COUNCIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement: (a) a fully developed plan to mitigate environmental harm; and (b) a "worst case" analysis of potential environmental harm if relevant information is unavailable or too costly to obtain.

2. Whether the Army Corps of Engineers gave adequate consideration to new information concerning environmental effects that was presented after the completion of the environmental impact statement.

PARTIES TO THE PROCEEDING

The petitioners are John O. Marsh, Jr., in his official capacity as Secretary of the Army, and Elvin R. Heiberg, III, in his official capacity as Chief of Engineers of the United States Army.

The respondents are Oregon Natural Resources Council, Oregon Guides and Packers Association, Inc., Rogue Flyfishers, Inc., and Rogue River Guides Association.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

OREGON NATURAL RESOURCES COUNCIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Army, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 832 F.2d 1489. The original opinion of the court of appeals is reported at 820 F.2d 1051. The opinion of the district court (App., *infra*, 30a-51a) is reported at 628 F. Supp. 1557.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 68a) was entered on November 24, 1987. The court of appeals denied the government's petition for rehearing on December 10, 1987 (App., *infra*, 69a). On February 18, 1988, Justice O'Connor issued an order extending the time

for filing a petition for a writ of certiorari to and including March 30, 1988. On March 23, 1988, Justice O'Connor further extended the time for filing the petition to and including April 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides, in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: • • • (2) all agencies of the Federal Government shall—
>
> • • • • •
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Pertinent excerpts from the regulations involved in this case are reproduced in an appendix to this petition (App., *infra*, 70a-72a).

STATEMENT

Petitioners seek review of a divided court of appeals decision reversing a district court's determination that the Army Corps of Engineers had fully complied with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, in preparing a supplemental environmental impact statement for the Elk Creek Dam.

1. In 1962, Congress authorized construction of the Rogue River Basin Project, a flood control program in southern Oregon. See Act of Oct. 23, 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1192-1193. The project was designed to include three dams: the Lost Creek Dam on the main stem of the Rogue River; Applegate Dam on the Applegate River, and the Elk Creek Dam on the Elk Creek tributary. The first two dams have already been built and are in operation, but the Elk Creek Dam remains uncompleted as a result of challenges to the adequacy of the environmental impact statement describing the project.

The Corps first evaluated the environmental consequences of the Elk Creek Dam in 1971 through the preparation of a final environmental impact statement in accordance with Section 102 of NEPA, 42 U.S.C. 4332. The Corps then began preconstruction land acquisition. A controversy arose, however, concerning the dam's effect on the temperature and turbidity of the Rogue River. The Corps completed an additional water quality evaluation in 1974, based on a computer simulation of the watershed, that indicated that the Elk Creek Dam, in combination with the Lost Creek Project, would not materially affect the Rogue River's water quality. Nevertheless, the Corps suspended the project pending resolution of the continuing debate. The Corps conducted a further evaluation in 1979, based on empirical data obtained from the Lost Creek Dam, that verified the results of the 1974 computer simulation. In 1980, the Corps prepared and issued a sup-

plemental environmental impact statement [hereinafter *Elk Creek Supplemental Statement*] describing the results of those studies, as well as several other environmental issues. See *Elk Creek Supplemental Statement* (preface).[1]

2. The *Elk Creek Supplemental Statement* identified the dam's contribution to downstream turbidity as "a major item of public concern" (*Elk Creek Supplemental Statement* (summary)). Elk Creek, in its natural state, experiences moderate to high turbidity during periods of high runoff (*id.* at 22-23). The proposed Elk Creek Dam was expected to modulate this condition by prolonging the duration of downstream turbid flow at reduced levels of turbidity. As the *Supplemental Statement* explained, the 1974 and 1979 Corps studies confirmed these expectations (*id.* at 33-34). The 1974 computer simulation demonstrated that the entire Rogue River Basin Project, consisting of three dams, would increase the Rogue River's turbidity by 2 to 3 JTU in low and average runoff years and by up to 6 to 9 JTU in high runoff years (*id.* at 33).[2] Elk Creek Dam, by itself, would increase the Rogue River's turbidity only 1 to 3 JTU because Elk Creek contributes only a small percentage of the Rogue's total flow (*ibid.*). The 1979 water quality study demonstrated a

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[1] The Corps' NEPA regulations provide for preparation of a supplemental environmental impact statement "whenever significant impacts resulting from changes in the proposed plan or new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action" (33 C.F.R. 230.11(b)). We have lodged a copy of the *Elk Creek Supplemental Statement* with the Clerk of the Court.

[2] The JTU (Jackson Turbidity Unit) is the unit of measurement for water clarity. As a general rule, the turbidity limit for drinking water is 5 JTU, turbidity of 10 JTU impairs flyfishing, turbidity of 20 JTU impairs other fishing methods, and a long-term turbidity of 50 JTU alters fish behavior. *Elk Creek Supplemental Statement* 21.

positive correlation between the computer model's predictions for the Lost Creek Dam with that dam's actual turbidity experience in 1977; this result reinforced the 1974 study's determinations (*id.* at 33-34). Based on these studies, the *Supplemental Statement* concluded that the increase in turbidity caused by Elk Creek Dam would have only minor effects on fish production, but that the combined effect of Lost Creek and Elk Creek Dams on the turbidity of the Rogue would impair angling to some degree (*id.* at 36-37).

The *Elk Creek Supplemental Statement* discussed measures to be taken to mitigate the dam's effects on aquatic life (*id.* at 35-37). The most significant effect on fish—the loss of spawning grounds for coho salmon and steelhead trout—had already been mitigated through the contruction of a fish hatchery (*id.* at 35). The fish hatchery would also mitigate any decrease in freshwater fish production due to increased turbidity (*id.* at 35-36). The *Supplemental Statement* noted, in addition, that the dam's multi-level withdrawal design would minimize turbidity effects on fish production (*id.* at 37).

The *Supplemental Statement* also discussed the project's effects on wildlife. The Elk Creek Dam would inundate 1,290 acres of wildlife habitat, adversely affecting deer, elk, and game bird populations. The *Statement* suggested that mitigation could be accomplished by managing selected lands to improve the quality of habitat, thereby augmenting their wildlife carrying capacity. *Elk Creek Supplemental Statement* 6, 38. The *Statement* specifically urged the use of habitat manipulative techniques, including development of palatable browse plants for deer and vegetation interfaces (or "edge") for quail, variation of foliage height, and placement of snags in the reservoir (*ibid.*). The *Statement* explained that the mitigation measures would be developed based upon the results of a

wildlife compensation plan currently underway at Applegate Dam and upon the further recommendations of federal and state agencies (*id.* at 6).

3. The Corps' Division Engineer reviewed the *Elk Creek Supplemental Statement* and, on February 19, 1982, concluded that the project should proceed, subject to congressional approval of funding (App., *infra*, 52a-58a). He noted that the project would have environmental impacts, but "[a]ll practical means have been incorporated into the project plans to avoid or minimize environmental harm and to mitigate for loss of fish and wildlife habitat" (*id.* at 57a-58a). Furthermore, "[t]he benefits to be realized through construction of Elk Creek Lake outweigh the economic and environmental costs, and completion of the project represents the course of action which, on balance, serves the overall public interest" (*id.* at 58a).

The Corps proceeded to conduct a water quality study pursuant to Section 404 of the Clean Water Act (33 U.S.C. (& Supp. III) 1344), which was completed in 19[illegible] (see App., *infra*, 33a). The Corps also redesigned certain portions of the dam (*ibid.*).[3] In August 1985, Congress appropriated the funds necessary to complete the Elk Creek Dam and directed the Corps to finish the project without further delay (*id.* at 33a-34a & n.5). See Act of Aug. 15, 1985, Pub. L. No. 99-98, Tit. I, 99 Stat. 314; see also S. Rep. 99-82, 99th Cong., 1st Sess. 97 (1985).

Shortly thereafter the Oregon Natural Resources Council, et al. (ONRC), brought this action in the United States District Court for the District of Oregon to enjoin construction of the Elk Creek Dam. The district court held an

[3] The Corps prepared an environmental assessment, in accordance with 33 C.F.R. 230.9, finding that no significant impacts resulted from these changes, and prepared a supplemental information report, in accordance with 33 C.F.R. 230.11(d).

evidentiary hearing, rejected each of ONRC's six NEPA-related claims, and entered judgment against ONRC (App., *infra*, 30a-51a). First, the court concluded that the *Supplemental Statement* properly considered the Elk Creek Dam's cumulative environmental impact by analyzing its effects in terms of the entire Rogue River Basin Project (*id.* at 37a-38a). The court next held that the *Statement* adequately described the affected area (*id.* at 38a-39a) and the environmental effects of the proposed project, including the opportunities to mitigate environmental harm (*id.* at 40a-42a). The court rejected ONRC's argument that the Corps' discount factor failed to provide a reasoned basis for choosing among alternatives (*id.* at 42a-45a). The court also rejected ONRC's argument that the Corps' scientific methodology was unreliable and that a "worst case" analysis was therefore required (*id.* at 45a-46a).

Finally the court held that the Corps was not required to prepare another supplemental environmental impact statement to address new information concerning the project's potential environmental effects (*id.* at 46a-49a). This new information, an Oregon Department of Fish and Wildlife report on Lost Creek fish mortality [hereinafter *ODFW Report*] and a Soil Conservation Service report on Elk Creek Soil characteristics [hereinafter *SCS Report*], was not available to the Corps at the time that it prepared the *Elk Creek Supplemental Statement*. The district court agreed with the Corps that these reports did not contain significant new information requiring supplementation of the existing Elk Creek studies. The Corps did, however, issue a Supplemental Information Report [hereinafter *Elk Creek SIR*] explaining why this new information was not significant (App., *infra*, 59a-67a).[4]

[4] The Corps' NEPA regulations provide for issuance of a supplemental information report where a supplemental environmental

4. ONRC appealed and a divided court of appeals affirmed in part and reversed in part (App., *infra*, 1a-2a). The court first held that the *Elk Creek Supplemental Statement* failed to satisfy NEPA because it lacked a detailed plan to mitigate environmental harm (App., *infra*, 4a-7a). The court stated (*id.* at 7a): "The importance of a mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement." The court next held that the Corps must prepare a new supplemental environmental impact statement to discuss the information contained in the *ODFW* and *SCS* reports (*id.* at 7a-13a). The court independently reviewed the scientific evidence and concluded, contrary to the Corps, that the new information "presented a legitimate concern about decreased survivability of fish and the potential for higher turbidity" and that "some of the proffered information is probably accurate" (*id.* at 11a).

The court further concluded that "the Corps' assessment of turbidity due to Elk Creek Dam is subject to uncertainty" (App., *infra*, 14a) and that the Corps must therefore either conduct additional research or prepare a "worst case" assessment of environmental harm (*id.* at 13a-15a). Finally, the court held that the Corps failed to take "a hard look at the cumulative environmental impacts" (*id.* at 16a) and must therefore supplement that portion of the Corps study (*id.* at 17a). The court affirmed the remainder of the district court's determinations (*id.* at 17a-20a) and remanded the case for "entry of appropriate injunctive relief" (*id.* at 21a).

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impact statement is not necessary, but where there is a need "to provide supplemental information to a point of concern discussed" in the final environmental impact statement (33 C.F.R. 230.11(d)).

Judge Wallace dissented in part (App., *infra*, 21a-29a). He principally concluded, after a careful canvassing of the scientific evidence, that the Corps acted reasonably in declining to prepare a new supplemental environmental impact statement in response to the *ODFW* and *SCS* reports (*id.* at 21a-28a).

REASONS FOR GRANTING THE PETITION

The court of appeals has departed from the teachings of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), and has imposed significant new NEPA obligations on federal agencies. The court's decision, which the court subsequently applied and extended in *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810 (1987),[5] requires all environmental impact statements to contain detailed and demonstrably effective mitigation plans and to include a "worst case" analysis whenever the agency lacks information or adequate scientific methodology to determine precisely a potential environmental effect. Neither NEPA nor its implementing regulations authorize these court-created directives. The court of appeals' decision also incorrectly held that the Corps gave inadequate consideration to new information concerning environmental effects that was presented after the completion of its supplemental environmental impact statement. The court's rigid new requirements would actually impede the goal of informed agency decision making by preventing federal agencies from carrying out their resource management responsibilities through systematic project develop-

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[5] The Solicitor General has sought review of the *Methow Valley Citizens Council* decision through a petition for a writ of certiorari filed simultaneously with this petition.

ment. The court's clear deviation from established precedent has great practical significance owing to the vast expanse of federal lands and the numerous planned and potential federal projects located within the Ninth Circuit.

1. Section 102(2)(C) of NEPA directs that federal agencies proposing actions that significantly affect the quality of the human environment must prepare a detailed statement on "the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C). This requirement serves two purposes: first, it obligates the agency to consider the environmental consequences of the proposed action; and second, it assures the public that the agency has considered environmental concerns in the decisionmaking process. *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

As this Court has explained, "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 558. Furthermore, "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act" (*id.* at 548). "The procedural duty imposed upon agencies by [Section 102(2)(C)] is quite precise, and the role of the courts in enforcing that duty is similarly precise." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976). "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken' " (*id.* at 410 n.21 (citation omitted)). Furthermore, the courts should defer to the judgment of the Council on Environmental Quality (CEQ)—the agency responsible for assuring proper implementation of NEPA (42 U.S.C. 4344)—which has promulgated regulations for preparing environmental impact

statements. "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

The court of appeals ignored these established principles and, relying solely on its own precedent, created two significant new NEPA requirements. The court incorrectly held that an agency must include in every environmental impact statement (a) a fully developed plan to mitigate environmental harm; and (b) a "worst case" analysis of potential environmental harm if relevant information concerning significant environmental effects is unavailable or too costly to obtain.[6]

a. The court of appeals apparently based its mitigation requirement on the fundamentally mistaken premise that NEPA imposes a substantive duty on federal agencies to mitigate environmental harm.[7] Neither NEPA, nor this

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[6] We believe that the court of appeals also erred in holding that the *Elk Creek Supplemental Statement*'s discussion of cumulative impacts was inadequate, but we do not press that question in this Court. The question of cumulative impacts is factbound and less significant than the mitigation, worst case, and new information issues presented here. Furthermore, the government may be able to cure that supposed deficiency on remand without an excessive commitment of time and resources. By contrast, the costs of fulfilling the court's mitigation, worst case, and new information requirements are certain to be substantial.

[7] The court indicated that some mitigation measures *must* be undertaken, stating (App., *infra*, 5a): "As long as significant measures are undertaken to mitigate the project's effects, the measures need not compensate completely for adverse environmental impacts." The court mistakenly relied on *Friends of Endangered Species* v. *Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985), for that proposition; *Jantzen* states only that if significant measures are undertaken to mitigate the project's effects, an environmental impact statement may not be necessary at all (*ibid.*). The court of appeals has since recognized a substantive duty to mitigate environmental harm in *Methow Valley Citizens*

Court's decisions interpreting the statute, impose such a requirement. This Court has repeatedly emphasized that NEPA requires an agency to consider and inform the public of potential environmental impacts; it does not require the agency to "elevate environmental concerns over other appropriate considerations." *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980).

In any event, the court of appeals erred in imposing a procedural obligation upon agencies—derived solely from its own precedents—to develop a "complete mitigation plan" within the environmental impact statement (App., *infra*, 7a).[8] The court's requirement finds no source in Section 102 of NEPA or the CEQ's implementing regulations. The CEQ regulations require an environmental impact statement to identify mitigation possibilities—as was done here (see pages 5-6, *supra*)—in the course of discussing project alternatives and the resulting environmental effects. See 40 C.F.R. 1502.14(f), 1502.16(h). But the regulations do not require development of a complete mitigation plan. The court's blanket statements that the "importance of the mitigation plan cannot be overestimated" (App., *infra*, 7a) and that "[i]t is a determinative factor in evaluating the adequacy of an environmental impact statement" (*ibid.*) find no support whatsoever in NEPA or the CEQ regulations. Indeed, the court's ap-

Council, where the court stated that Section 102 of NEPA "requires that 'action be taken to mitigate the adverse effects of major federal actions' " (833 F.2d at 819, quoting *Stop H-3 Ass'n* v. *Brinegar*, 389 F. Supp. 1102, 1111 (D. Haw. 1974), rev'd on other grounds, 533 F.2d 434 (9th Cir.), cert. denied, 429 U.S. 999 (1976)).

[8] The court relied (App., *infra*, 5a) on *Northwest Indian Cemetery Protective Ass'n* v. *Peterson*, 795 F.2d 688, 697 (9th Cir. 1985), cert. granted on other grounds, No. 86-1013 (May 4, 1987), for that proposition. That case, in turn, cited *Adler* v. *Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982), which made no mention of mitigation at all.

proach pervasively conflicts with the CEQ's regulations mandating early application of NEPA (40 C.F.R. 1501.2, 1502.5(b)), encouraging tiered environmental analysis (40 C.F.R. 1502.20), and forbidding agencies from committing resources in a manner that will bias the agency's ultimate decision (40 C.F.R. 1502.2(f)).

The court of appeals' decision on this score would have severe consequences. The decision would prevent an agency from evaluating the environmental effects of a proposed project through the familiar and sensible concept of staged project development.[9] In this case, for example, the Corps' *Elk Creek Supplemental Statement* explained that the proposed dam would have some adverse affects on wildlife, and quite sensibly suggested that wildlife mitigation techniques be employed based upon the experience gained in earlier stages of the Rogue River Project.[10] Thus, the environmental impact statement fulfilled its intended function by identifying the environmental consequences of the proposed action and ways in which those consequences might be ameliorated. The court of appeals' decision nevertheless forbids this approach: instead, the environmental impact statement cannot be completed until a complete mitigation plan has been developed. In essence, an agency cannot fulfill its duties under NEPA until it has addressed definitively how it will mitigate every reasonably foreseeable environmental impact.

[9] See, *e.g.*, D. Dannenbring & M. Starr, *Management Science: An Introduction* 548 (1981) ("A project is itself a combination of many varied and complex tasks or activities. These tasks are interdependent in that most cannot begin until some other task has been completed.").

[10] See *Elk Creek Supplemental Statement* 6 ("Measures to compensate project-caused loss of wildlife habitat associated with reservoir construction will be developed, based upon the results of the wildlife compensation plan currently underway at Applegate Project and recommendations of the Oregon Department of Fish and Wildlife and the U.S. Fish and Wildlife Service.").

As a practical matter, the court of appeals' approach would impede or frustrate a wide range of federal projects without any corresponding benefits. Agencies would be forced to defer environmental analysis until far along in the planning process and to invest resources on a large scale before making even preliminary decisions. By deferring the environmental analysis to satisfy the requirements of this decision, the agencies would run the grave risk of having proposed projects enjoined on the ground that irretrievable commitments have been made without the requisite environmental analysis. Moreover, the court of appeals' requirement of a completed mitigation plan is counterproductive when, as in the instant case, the specific mitigation techniques to be used are to be chosen and refined as the results of on-going empirical studies become available.

"As *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas & Elec. Co.*, 462 U.S. at 100. NEPA and its implementing regulations were deliberately structured to give federal decisionmakers great latitude to determine the appropriate scope of their environmental discussion and evaluation. See, *e.g.*, *Strycker's Bay Neighorborhood Council*, 444 U.S. at 227.[11] The court's decision here would eliminate this latitude by forcing agencies to fit all of their actions into the court's rigid and counterproductive formula for environmental decisionmaking.

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[11] See also *Friends of the Earth* v. *Hintz*, 800 F.2d 822, 837-838 (9th Cir. 1986); *River Road Alliance, Inc.* v. *Corps of Engineers*, 764 F.2d 445, 448 (7th Cir.), cert. denied, 475 U.S. 1055 (1985); *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985); *Roosevelt Campobello Int'l Park Comm'n* v. *EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982).

b. The court of appeals also erred in concluding (App., *infra*, 13a-14a) that a "worst case" analysis is required whenever an agency is unable to obtain information on which to base a reasoned decision. The court noted (*id.* at 14a n.8) that CEQ regulations had at one time required that environmental impact statements evaluate uncertainty by including a "worst case analysis and an indication of the probability or improbability of its occurrence" (40 C.F.R. 1502.22 (1985)), but that CEQ had subsequently rescinded that requirement.[12] The court nevertheless determined that "the rules embodied in the regulation remain in effect even though the regulation was rescinded" because the "worst case regulation is a codification of prior NEPA case law" (App., *infra*, 14a n.8), citing its previous decision in *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984).

The *Save Our Ecosystems* decision derives that proposition from *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark (SOCATS)*, 720 F.2d 1475, 1478 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984), which in turn mistakenly relies on *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983). The question in *Sigler* was whether the Army Corps of Engineers was required to comply with the CEQ worst case regulation under the particular facts of that case. The Fifth Circuit first admitted that while there is "some language in NEPA which may be said to endorse generally the concept of a worst case analysis" the statute's "literal language does not require a worst case analysis" (*id.* at 969). The court next noted that a series of judicial decisions had recognized that NEPA does contemplate that agencies would engage in " '[r]easonable forecasting

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[12] We have reproduced the relevant portions of CEQ's present regulation and the rescinded "worst case" regulation in the appendix, *infra*, 70a-72a.

and speculation' " concerning future environmental effects, including the "probabilities of the occurrence" and the " 'cost of uncertainty—i.e. the costs of proceeding without more and better information' " (*id.* at 970).[13] The court then stated that the "CEQ's worst case analysis merely codifies these judicially created principles" (*id.* at 971). Thus, the Fifth Circuit effectively concluded that the worst case regulation was the CEQ's mechanism for implementing certain judicially recognized NEPA objectives. The court did not hold that the worst case methodology was the *only* allowable mechanism for effecting those general goals.

The CEQ has adhered to the objectives identified in *Sigler*, but has determined that "the 'worst case analysis' requirement is an unproductive and ineffective method of achieving those goals" (51 Fed. Reg. 15618, 15620 (1986)).[14] The CEQ has therefore adopted "a wiser and

[13] The court specifically cited *Scientists' Institute for Public Information, Inc.* v. *AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Carolina Envtl. Study Group* v. *United States*, 510 F.2d 796, 799 (D.C. Cir. 1975); and *Alaska* v. *Andrus*, 580 F.2d 465, 473-474 (D.C. Cir. 1978), vacated on other grounds *sub nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978).

[14] The CEQ had received frequent complaints that the worst case approach was not an effective method for addressing uncertainty and led to excessive paperwork and delays. 51 Fed. Reg. 15619-15620 (1986). "Experts in the field of risk analysis and perception stated that the 'worst case analysis' lacks defensible rationale or procedures, and that the current regulatory language stands 'without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty.' " 50 Fed. Reg. 32234, 32236 (1985). The CEQ itself found that the methodology "can breed endless hypothesis and speculation" (51 Fed. Reg. 15620 (1986)) and "has proved counterproductive, because it has led to agencies being required to devote substantial time and resources to preparation of analyses which are not considered useful to decisionmakers and divert the EIS process from its intended purpose" (50 Fed. Reg. 32236 (1985)). We described some of these difficulties in a previous petition for a writ of certiorari in *SOCATS*. See *Clark* v. *Southern Oregon Citizens Against Toxic Sprays, Inc.*, cert. denied, 469 U.S. 1028 (1984) (White and O'Connor, JJ., dissenting). The CEQ's effort to alleviate these difficulties, after the denial of certiorari in *SOCATS*, by revision of its regulations has now been repudiated by the court of appeals.

more manageable approach to the evaluation of reasonably foreseeable significant adverse impacts in the face of incomplete or unavailable information" (*id.* at 15620).[15] The court of appeals' decision in this case effectively overrules the CEQ's new regulation and installs worst case analysis as a permanent feature of NEPA compliance.

This aspect of the court of appeals' decision is obviously contrary to this Court's recognition in *Andrus* v. *Sierra Club* that the CEQ's judgment is entitled to "substantial deference" even when the agency has changed its regulations governing NEPA compliance (442 U.S. at 358). See also, *e.g.*, *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). As in the case of its new mitigation requirements, the court of appeals' holding here would have serious consequences. As the CEQ has explained, federal agencies would be forced to conduct wasteful and time-consuming inquiries into speculative impacts that lack "a firm connection between credible science and the hypothetical consequences of an agency's proposed action." 50 Fed. Reg. 32236 (1985). This sort of "pure conjecture • • • lacking a credible scientific basis is

[15] The CEQ's revised regulation provides that when relevant information cannot be obtained because the costs of obtaining it are exorbitant or the means to obtain it are not known, the environmental impact statement must identify the unavailable information and its relevance, must summarize existing scientific information bearing on foreseeable environmental impacts, and must contain the agency's evaluation of those impacts based on research methods generally accepted in the scientific community. 40 C.F.R. 1502.22.

not useful to either the decisionmaker or the public" (*ibid.* (emphasis in original)).

2. The court of appeals also erred in holding that the Corps was obligated to prepare another supplemental environmental impact statement addressing the *ODFW* and *SCS* reports. See pages 7-8, *supra*. The Corps evaluated the information contained in those studies and reasonably concluded that a supplemental statement was not necessary, setting forth its reasons in the *Elk Creek SIR*. See App., *infra*, 60a-67a. The district court heard testimony on this matter and concluded that the Corps' judgment was reasonable (*id.* at 46a-49a). The court of appeals nevertheless substituted its scientific judgment for that of the agency, in basic disregard of this Court's precedents.

This Court has made clear that neither NEPA nor its legislative history "contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions" (*Kleppe*, 427 U.S. at 410 n.21). "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences" (*ibid.*). Furthermore, a court has no special expertise to evaluate scientific data and thus "must generally be at its most deferential" when examining an agency's scientific determinations. *Baltimore Gas & Elec. Co.*, 462 U.S. at 103.

In this instance, the Corps examined the *ODFW* and *SCS* reports and, to the extent that further discussion was necessary, provided it in the *Elk Creek SIR*. The *ODFW Report* had suggested that the Elk Creek Dam could result in decreased survivability of chinook salmon, increased disease among fish, higher turbidity, and less successful sport fishing. The Corps reviewed these projections, utilizing two independent experts and the Corps' Water Experiment Station, and concluded that the *ODFW* results were

inconclusive and not reliable (App., *infra*, 63a-66a).[16] The *SCS Report* had indicated that the soils in the Elk Creek area have higher sediment-producing capacity than the Corps had estimated and might therefore make a greater contribution to turbidity. However, the Forest Service had previously raised essentially the same issue and the Corps had responded to it in the *Elk Creek Supplemental Statement*.[17] Finally, the Corps presented the district court with additional scientific evidence supporting its conclusions regarding both the *ODFW* and *SCS* reports, and the district court, upon reviewing the evidence, found the Corps' decision not to prepare another supplemental environmental impact statement to be reasonable (App., *infra*, 47a-49a).

The court of appeals' reversal of the district court determination cannot be squared with *Kleppe* and *Baltimore Gas & Elec. Co.* The court of appeals accorded no deference to either the district court or the Corps. It purported to follow its previous decision in *Stop H-3 Ass'n* v. *Dole*, 740 F.2d 1442 (9th Cir. 1984), cert. denied, 471 U.S. 1108 (1985), which provides that "[w]hen new information

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[16] The Corps pointed out, for example, that the *ODFW Report* had failed to take into account that the dam would increase survival of young fish by reducing peak flows, that the *Report*'s methodology had not been validated, and that the *Report* failed to demonstrate a supposed causal link between the construction of the Lost Creek Dam and a subsequent episode of high fish mortality (App., *infra*, 63a-65a).

[17] The Corps explained that soil characteristics do not play a significant role in predicting turbidity; rather, "soil disturbances are the chief contributing factor to turbidity in runoff" (*Elk Creek Supplemental Statement* 115). The Corps also noted in the *Elk Creek SIR* that the United States Geological Survey's soil report indicated that, due to watershed recovery programs, the average daily turbidity at Elk Creek was now as low as it had been in the 1970's and that the Elk Creek Dam was designed with a multilevel intake tower to control turbidity levels (App., *infra*, 66a).

comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing requirements" (740 F.2d at 1463-1464).[18] But the court actually reevaluated the scientific evidence as a de novo factfinder. See App., *infra*, 7a-13a. As Judge Wallace explained in dissent, "It is not the function of th[e] court to decide whether the Corps' analysis of the two studies was 'correct' scientifically" (*id.* at 28a). And as his thorough review of the record demonstrates, the Corps' conclusion that there was no need to prepare another supplemental environmental impact statement was, in any event, supported by an abundance of scientific evidence and was clearly reasonable (*id.* at 21a-28a). The court of appeals' resolution of the new information question is a clear departure from this Court's precedents that will substantially and needlessly burden the Corps' completion of the Elk Creek Dam. It is therefore appropriate to review that question in conjunction with the mitigation and worst case issues.

3. The court of appeals' decisions in this case and in *Methow Valley Citizens Council* v. *Regional Forester*, *supra*, would greatly expand the federal agencies' substantive and procedural duties under NEPA. None of the newly imposed duties finds its source in NEPA or in its implementing regulations; rather, they are purely judicial creations. Furthermore, the court's two decisions have confirmed those duties as a settled element of the Ninth Circuit's peculiar NEPA jurisprudence. The court's clear

[18] The *Stop H-3 Ass'n* decision further states that the reasonableness of the agency's decision depends on the significance of the new information, its probable accuracy, the care the agency gave to its consideration of the information, and whether the agency gave an explanation of its decision. See 740 F.2d at 1464.

deviation from this Court's NEPA precedents has great practical significance. As we have already explained, the court's newly fashioned NEPA obligations would impose substantial burdens on the federal government and, ultimately, the taxpaying public, without corresponding benefits. Indeed, these court-imposed requirements are not only contrary to sound environmental decisionmaking, they are contrary to the goals of NEPA and the procedures created by the CEQ for achieving those goals. The resulting costs would be enormous even if limited to the projects within the Ninth Circuit owing to the vast expanse of federal lands and the numerous planned and potential federal projects subject to that court's rulings. This Court's review is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.[19]

Respectfully submitted.

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APRIL 1988

[19] The Court may wish to consolidate this case with *Robertson* v. *Methow Valley Citizens Council*, No. 87-____, or to order that the cases be heard in tandem. The government's petition for a writ of certiorari in that case (which is being filed simultaneously with this petition) presents overlapping, but not identical, NEPA issues.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-3670
D.C. No. CV-85-6433-E

OREGON NATURAL RESOURCES COUNCIL, OREGON GUIDES AND PACKERS ASSN., INC., ROGUE FLYFISHERS, INC., AND ROGUE RIVER GUIDES ASSN., PLAINTIFFS-APPELLANTS

v.

JOHN O. MARSH, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, AND ELVIN R. HEIBERG, III, IN HIS OFFICIAL CAPACITY AS CHIEF OF ENGINEERS OF THE UNITED STATES DEPARTMENT OF THE ARMY, DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
JAMES M. BURNS, District Judge, Presiding

Argued and Submitted
July 8, 1986—Portland, Oregon

Filed June 23, 1987
Amended November 24, 1987

ORDER AND AMENDED OPINION

Before: J. CLIFFORD WALLACE, WARREN J. FERGUSON and WILLIAM A. NORRIS, Circuit Judges.

Opinion by Judge FERGUSON: Partial Concurrence
Partial Dissent by Judge WALLACE

ORDER

The majority opinion of the court filed June 23, 1987 is amended by deleting from the opinion the last sentence thereof, which reads:

> "Attorneys fees and costs are awarded to plaintiffs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412."

This amendment is without prejudice to further proceedings involving applications for attorney fees.

OPINION

FERGUSON, Circuit Judge:

Plaintiffs, the Oregon Natural Resources Council, Oregon Guides and Packers Association, Rogue Flyfishers, Inc., and Rogue River Guides Association ("Resources Council"), appeal the denial of an injunction to stop construction by the United States Army Corps of Engineers ("Corps") of a dam on Elk Creek in Southern Oregon. The Resources Council contends that the Corps' final supplemental environmental impact statement ("EIS") for the dam project fails to comply with the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 853 (1970) (codified at 42 U.S.C. § 4332) ("NEPA"). We affirm in part and reverse in part.

I.

Elk Creek is a tributary of Oregon's Rogue River. The Rogue was one of eight rivers in the nation designated as "wild and scenic" in the Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified at 16 U.S.C. § 1271). The Rogue is known nationally for its white-water rafting and fly-fishing.

In 1962, Congress authorized construction of three dams to control flooding of the Rogue River Basin: Elk Creek Dam, Applegate River Dam, and Lost Creek Dam. The latter two dams are completed. The Elk Creek project consists of a proposed concrete dam 249 feet high and 2,580 feet long. The reservoir behind the proposed dam would collect runoff from most of Elk Creek's watershed and cover 1,290 acres of land.

In 1971, the Corps filed a final EIS for the Elk Creek Project. In 1975, after studying the projected effects of the dam on turbidity[1] in the Rogue River, the Corps filed a draft supplemental EIS. Construction of the project was suspended until completion of further water quality studies.

In 1980, the Corps filed a revised draft supplemental EIS, which included turbidity and temperature projections based on the Corps' observations of turbidity caused by the Lost Creek Dam during the year 1977 and the Corps' computer simulation models. Several state and federal agencies criticized the Corps' turbidity analysis on the ground that rain runoff levels during 1977 were the lowest on record in the area. The Corps placed these critical comments, and its responses to them, in a separate section, and released the aggregate as its final supplemental EIS.

The Resources Council[2] then brought this action in federal district court for a temporary restraining order, a

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[1] "Turbidity" is defined in the glossary to the final supplemental EIS as "an expression of the optical property of water which causes light to be scattered and absorbed rather than transmitted through in straight lines. Turbidity is caused by the presence of suspended matter." Simply stated, turbidity is murkiness due to stirred-up sediment.

[2] The plaintiffs are several nonprofit organizations representing their members who assert injury by the dam's construction. The plaintiffs therefore have standing under the rule in *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

preliminary injunction, and a permanent injunction to stop construction of Elk Creek Dam. The Resources Council argued that the final supplemental EIS failed in several ways to comport with the requirements of the NEPA and regulatory guidelines of the Council on Environmental Quality. The Resources Council also contended that the Corps was required to prepare a new supplemental EIS because of new information. The district court found the final supplemental EIS adequate and denied the requested relief. The Corps has since awarded contracts for relocation of roads and utilities and for construction of the dam.

II.

The Resources Council contends that the final supplemental EIS violates the NEPA procedural standards and the Council on Environmental Quality guidelines in six respects. The district court held that the environmental impact statement comported with these standards. We review de novo the district court's determination of whether the EIS is reasonably thorough in discussing the significant aspects of the probable environmental impact of the proposed agency action. *Enos v. Marsh*, 769 F.2d 1363, 1372 (9th Cir. 1985) (applying a "rule of reason"). Purely factual findings are, of course, reviewed for clear error. *Id.*

We thus endeavor to determine whether the final supplemental EIS satisfies the two purposes of an EIS: (1) to provide decisionmakers with enough information to aid in the substantive decision whether to proceed with the project in light of its environmental consequence; and (2) to provide the public with information and an opportunity to participate in gathering information. *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985);

California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (the "form, content and preparation [of the EIS] foster both informed decisionmaking and informed public participation"); 40 C.F.R. § 1502.1 (purpose of EIS is to "provide full and fair discussion of significant environmental impacts and . . . [to] inform the decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts . . .").

First, the Resources Council contends that the final supplemental EIS is deficient because it fails to discuss adequately ways to mitigate adverse environmental impacts of the project. Specifically, the Resources Council claims that the mitigation plan for wildlife contains neither a detailed analysis of mitigation measures nor an explanation of how effective those measures would be. We agree, and reverse for further proceedings on this issue.

An EIS must include a discussion of measures to mitigate adverse environmental impacts of the proposed action. 40 C.F.R. § 1502.16(h). As long as significant measures are undertaken to mitigate the project's effects, the measures need not compensate completely for adverse environmental impacts. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985). The mere listing of mitigation measures, however, is insufficient to satisfy the NEPA requirements. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986). Moreover, the EIS must analyze the mitigation measures in detail and explain the effectiveness of the measures. *See id.*

Here, the mitigation plan for wildlife is not yet fully developed. The mitigation plan, published in 1980, states: "Measures to compensate project-caused loss of wildlife habitat associated with reservoir construction will be developed, based upon the results of the wildlife compen-

sation plan currently underway at Applegate Project and recommendations of Oregon Department of Fish and Wildlife and the U.S. Fish and Wildlife Service." No mitigation plan had been finalized as of January 1986. We fail to see how mitigation measures can be properly analyzed and their effectiveness explained when they have yet to be developed.

Moreover, the mitigation measures set forth in the final supplemental EIS are inadequate to satisfy the Council on Environmental Quality guidelines. The mitigation plan for wildlife, in its entirety, states:

> The compensation [for project-caused loss of wildlife habitat] would be accomplished by managing selected lands to increase the quality of habitat and therefore its carrying capacity for wildlife. The management would consist for a number of habitat manipulative techniques in conjunction with other land uses, landscaping at the project, and development of recreation sites. Specific habitat development measures would be oriented toward development of palatable browse plants, creation of "edge," maximizing foliage height diversity in certain areas, and creation of snags in the reservoir. This compensation plan will be developed in coordination with Federal and state resource agencies.

This plan lists general measures to mitigate the impact of the project on wildlife. The plan refers to "habitat manipulative techniques," but fails to specify which techniques will be used. It also fails to identify any of the "specific habitat development measures" that would be utilized to develop palatable browse plants, create "edge," maximize foliage height diversity, or create snags in the reservoir. More important, there is no analysis of the

mitigation measures listed, or any estimation of how effective the measures will be.

The importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement. Without a complete mitigation plan, the decisionmaker is unable to make an informed judgment as to the environmental impact of the project – one of the main purposes of an environmental impact statement. *See Citizens for a Better Henderson*, 768 F.2d at 1056.

Because the wildlife mitigation plan here merely lists measures to be used and includes neither an analysis nor an explanation of effectiveness, it is inadequate to satisfy the NEPA or Counsel on Environmental Quality mitigation guidelines. *See Northwest Indian Cemetery Protective Ass'n*, 795 F.2d at 697.

III.

The Resources Council also contends that the Corps violated the NEPA by failing to prepare a new supplemental EIS taking into account new information acquired since the 1980 EIS. We agree, and remand for further proceedings on this issue as well.

A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions after release of an EIS. *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1463 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985). The agency must supplement the EIS if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)( )(ii); *see Enos*, 769 F.2d at 1373. When new information comes to light, the agency must consider it, evaluate it, and make a reasoned determination whether it

is of such significance as to require implementation of formal NEPA filing requirements. *Stop H-3 Ass'n*, 740 F.2d at 1463-64.

We will uphold an agency's decision not to supplement an environmental impact statement in light of new information if the decision is reasonable. *Enos*, 769 F.2d at 1373.

> Reasonableness depends on the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.

Stop H-3 Ass'n, 740 F.2d at 1464 (citation omitted). Applying the *Stop H-3 Ass'n* standard,[3] we conclude that subsequent to the preparation of the final supplemental EIS, significant new information came to light. We further conclude, based upon the proceedings in the district court, that this information is probably accurate. The Corps failed to exercise the proper degree of care in evaluating the impact of the new information and failed to properly support its decision not to supplement the EIS with an explanation or additional data. Thus, a new supplemental EIS should have been prepared.

Two studies provided significant new information regarding the environmental impact of the project. The

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[3] We note, however, that the factors set forth in *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1464 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985), to determine reasonableness are neither mandatory nor exclusive. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980), upon which *Stop H-3 Ass'n* relies, specifically states that "[r]easonableness depends *on such factors as . . . .*" *Id.* at 1024 (emphasis added).

Oregon Department of Fish and Wildlife concluded that the project could result in decreased survivability of chinook salmon, higher turbidity, increased disease potential in fish, and decreased prospects for lure- and fly-fishing.[4] The United States Soil Conservation Service found a greater turbidity potential than indicated by the final supplemental EIS. These studies contained the significant new information contemplated by *Stop H-3 Ass'n*.

The final draft of the Fish and Wildlife Department study, dated August 5, 1985, was based on the impact of Lost Creek Dam on salmon and steelhead populations downstream. Department scientists observed decreased survival of chinook salmon, and speculated that it was a result of increased water temperatures caused by the release of warmer water from the Lost Creek Reservoir. Based on Lost Creek Dam's impact on survivability, the Department believed that conditions from Elk Creek Dam also would affect negatively chinook salmon survivability. Department scientists concluded that, even though their study was not conclusive, this phenomenon should be studied further before Elk Creek Dam is built.

With regard to higher turbidity, information was based on a study of logging and road-building activity in the Elk Creek watershed since 1980. The logging and road-building has caused soil disturbance. Fish and Wildlife Department scientists believe that this activity will result in higher turbidity than that reported in the final supplemental EIS. Consequently, they suggest additional studies on turbidity potential before the dam is built.

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[4] The district court noted that the Corps is still reviewing the concerns expressed in the final Department study. Because the Corps has yet to complete its review of the new information, it is too early to conclude that the new information is not significant.

As to disease potential in fish, Fish and Wildlife Department statistics indicate that in 1979, following the construction of Lost Creek Dam, there was a 76% mortality rate in fall chinook salmon populations due to disease and a 32% mortality rate in 1980. Although there has been almost no mortality since 1981, Department scientists concluded there may be a connection between dam closure and the potential for increased disease among fish.

Finally, the Fish and Wildlife Department was concerned about higher flows in the Rogue River that could decrease the effectiveness of lure- and fly-fishing along the river, including the wild and scenic portion. The Department wanted to conduct studies to evaluate this concern, but the Corps reduced the Department's budget, making further study impossible. The Corps evaluated the Department study and concluded that the new information was not significant enough to warrant a new supplemental EIS.

The Soil Conservation Service soil study also revealed significant new turbidity information tending to corroborate the Department study. The Soil Conservation Service study indicates that the Elk Creek watershed has substantially greater turbidity potential than previously reported in the EIS. Uncontradicted testimony showed that the soil content in the watershed is different than indicated in the final supplemental EIS. The Corps conducted no studies after receiving this new information because it had investigated erosion potential in 1979 and found nothing to substantiate the Department's concerns over the soil study. Thus, the Corps concluded that no significant new information had been discovered.

The district court found that the Corps' decision not to release a new supplemental EIS was reasonable. Like the district court, we review the agency's decision for reasonableness. *See Enos*, 769 F.2d at 1373. We conclude

otherwise. The Department presented new information as a result of its study of Lost Creek Dam's impact on the river. Although the evidence is not conclusive, it presented a legitimate concern about decreased survivability of fish and the potential for higher turbidity based on information from the two studies that was not available at the time the final supplemental EIS was published. The evidence clearly is environmentally significant under the *Stop H-3 Ass'n* test.

The information must be more than environmentally significant. It must be "probably accurate" as well. *Stop H-3 Ass'n*, 740 F.2d at 1464. Based on our review of the experts' testimony and data, we believe that, at the very least, some of the proffered information is probably accurate. Although the Corps had two independent experts evaluate the Fish and Wildlife Department's study, and these experts were critical of many of the conclusions reached, the experts also agreed with significant portions of the study. The Corps did not dispute that there was increased logging and road-building activity in the Elk Creek watershed since 1980. The Fish and Wildlife Department is concerned that this activity will result in increased turbidity.

The Corps also did not respond to the study's conclusions concerning increased fish mortality from epizootic diseases.[3] The information admittedly was not conclusive. Yet, the study raised legitimate concerns regarding the relationship between dam construction and epizootic diseases. The Corps should have considered the information, evaluated its impact and, at the very minimum, sup-

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[3] An epizootic disease is a disease that affects many members of a population at the same time. *See Webster's Third New International Dictionary* 766 (1976).

ported its decision not to supplement with a statement of explanation or additional data. *Id.* The Corps does not appear to have exercised the proper degree of care regarding the new information. The Corps also has not supported its decision with a statement of explanation or additional data.

The testimony below also reveals that the information provided by the Soil Conservation Service was never considered by the Corps, even when the Corps issued its Supplemental Information Report in September 1985. In response to questions submitted by the Council of Environmental Quality (CEQ) in 1981, the Corps stated that soils in the Elk Creek Watershed erode more easily than those in the Lost Creek Watershed and therefore produce a higher volume of suspended material per unit of stream runoff and require a longer time to settle out. The Corps concluded that this factor was considered in the modeling effort. Later, in response to commentary (identified as "Letter 14," attached to the final supplemental EIS) submitted in response to the draft EIS, the Corps stated that morphological factors cannot be incorporated into the WESTEX model[6] but are qualitatively included in the overall analysis of the potential turbidity of the watershed.

However, when presented with evidence showing that the soil content in the Elk Creek watershed was different from that indicated in the final supplemental EIS, the Corps chose not to respond. Table Four of the final supplemental EIS indicates that erosion potentials differ with soil associations. Further, the EIS states that turbidity is "generally caused by soil particles in the water column

[6] The WESTEX model is a mathematical model developed by the Corps' Waterways Experiment Station in Vicksburg, Mississippi, and the University of Texas. The Corps used this model to analyze potential turbidity problems from Elk Creek Dam.

which are washed downstream in the runoff from the watershed." Soil type and turbidity may not be directly related, as the Corps contends. Yet, the data reveals that soil type is related to erosion potential which, in turn, affect turbidity. The Corps took this into account earlier in its analysis and should do so again using the new information. Even if this data cannot be included in the WESTEX model, the Corps should include it qualitatively in its "overall analysis" of turbidity.

These are significant matters, the accuracy of which is not disputed. The Corps did not address adequately these issues. Thus, applying the final two factors of *Stop H-3 Ass'n*, we conclude that the Corps must prepare a supplemental EIS to address these issues.[7]

IV.

The Resources Council also contends that the Corps was required by the CEQ "worst case" regulation to research further the effects of Elk Creek Dam on turbidity in the Rogue River during high, average, and normal-low rainwater runoff years.

The worst case analysis regulation, 40 C.F.R. § 1502.22, requires that when there are gaps in relevant information or scientific uncertainty with regard to significant adverse environmental effects, the agency must make it clear that the information is lacking or that uncertainty exists. If information is lacking that is essential to a reasoned choice and the cost of obtaining it is not exorbitant, the agency

[7] We note that the United States Fish and Wildlife Service also recommended a new supplemental EIS because there may no longer be a need for the water storage assumed necessary in the final supplemental EIS.

must obtain the information and include it in the statement or include a worst case analysis.[8]

The Oregon Department of Fish and Wildlife formally criticized the Corps' conclusion that Elk Creek Dam would have little effect on temperature and turbidity on the Rogue. The state agency specifically disagreed with the Corps' finding that Elk Creek would make only a small contribution to total flow in the Rogue River and commented that there may be periods when Elk Creek provides a significant percentage of the total flow of the Rogue. The Corps, in responding to the state agency's comment (identified as "Letter 6," attached to the final supplemental EIS), acknowledged that Elk Creek could contribute up to 25% of the flow in the Rogue during high flow periods. Thus, the Corps' assessment of turbidity due to Elk Creek Dam is subject to uncertainty. This uncertainty is disclosed in the final supplemental EIS.

The district court concluded that the Corps complied with the worst case analysis requirement because the final supplemental EIS included comments that exposed uncertainty, if uncertainty did in fact exist. Yet, exposing uncertainty is not enough. *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 n.5 (9th Cir. 1984), requires that the Corps include a worst case analysis in the EIS when there are gaps in the information engendering scientific uncertainty which the agency determines to be important and when the necessary information cannot be obtained because of scientific impossibility or because the costs of

[8] We reject the argument of the Corps that section 1502.22 is inapplicable due to its rescission on May 27, 1986. The worst case regulation is a codification of prior NEPA case law. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984). Thus, the rules embodied in the regulation remain in effect even though the regulation was rescinded.

obtaining it would be exorbitant. *See also Oregon Environmental Council v. Kunzman*, Nos. 85-4266, 85-4308, and 86-3779, Slip Op. at 18 (9th Cir. May 12, 1987). The Corps did not include a worse case analysis and did not conduct any further research with regard to the water flow contribution from Elk Creek. The Corps should pursue one of these alternatives.

Additionally, since the Corps is now required to consider new information brought forth by the two studies, the Corps should take this information into account in its decision concerning a worst case analysis. If uncertainty remains at that time, the Corps should prepare a worse case analysis or conduct further research with regard to the new information.

V.

The Resources Council further contends that the Corps unreasonably limited the scope of the final supplemental EIS by failing to consider the cumulative effects of all three dam projects, Lost Creek Dam, Applegate Dam, and Elk Creek Dam, the first two of which already have been completed. The Resources Council contends that the Corps should address the cumulative effects of the dams in a single EIS because the three components of the Rogue River Basin Project are connected.[9]

[9] The parties disagree as to the appropriate standard of review for this issue. The Resources Council contends that the decision to limit the scope of an EIS is akin to a decision not to prepare a statement at all. Therefore, under *Foundation for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1177 (9th Cir. 1982), we would review the decision to determine its reasonableness. Appellees contend that this court should review the decision to determine whether it is arbitrary and capricious. Neither contention is correct. As stated previously, this court reviews the district court's conclusion to determine whether it is based on an erroneous legal standard or on clearly

The "cumulative impact" regulation requires the Corps to evaluate "the incremental impact of the action when added to other past, present, and reasonably foreseeable actions." 40 C.F.R. § 1508.7. Although the CEQ guidelines require that "cumulative actions" be considered together in a single EIS, 40 C.F.R. § 1508.25(a)(2), and "cumulative actions" consist only of "proposed actions," this does not negate the requirement of 40 C.F.R. § 1508.7 that the Corps consider cumulative impacts of the proposed actions which supplement or aggravate the impacts of past, present, and reasonably foreseeable actions.

The district court correctly ruled that a separate EIS was not required for the entire project. Only proposed actions must be discussed in a separate EIS. 40 C.F.R. § 1508.25(a)(2). The court also concluded that the final supplemental EIS adequately described and analyzed the impacts in terms of the effects of the entire project. The court was convinced that the Corps took a hard look at the cumulative impacts in the EIS.

We disagree with the district court that the Corps took a hard look at the cumulative environmental impacts. Plaintiffs point out two examples of the Corps' failure to consider the cumulative impacts. First, although the final supplemental EIS conceded that the overall basin project would increase the turbidity of the Rogue River, it concluded that there would be no major adverse effect on fish production from increased turbidity. In reaching this conclusion, however, it considered only the turbidity created by the individual project. Similarly, in response to a comment made by the United States Environmental Protection Agency suggesting that the EIS should discuss the effects of Lost Creek Dam on downstream water quality, the

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erroneous findings of fact. *See Northwest Indian Cemetery Protective Ass'n*, 795 F.2d at 696.

Corps responded that the Elk Creek EIS was not the proper place to discuss the effects of Lost Creek Lake. Insofar as the effects of the Lost Creek Dam were necessary to a complete presentation of the cumulative impact of construction of Elk Creek Dam, we disagree.

The synergistic impact of the project should be taken into account at some stage, and certainly before the last dam is completed. In *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the Court specifically noted that "an agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project when preparing the comprehensive statement on the cumulative impact of the remaining proposals." *Id.* at 415 n.26.

While a separate EIS is not required, the Corps should consider the impact of Elk Creek Dam in conjunction with Lost Creek Dam and, if appropriate, Applegate River Dam. The Corps is building Elk Creek Dam in an area that already has two dams. It must consider the areas as it finds it and take into consideration the cumulative impact of the basin project.

VI.

We affirm the district court's rulings on the Resources Council's remaining three challenges. First, the Resources Council contends that the final supplemental EIS gave no meaningful response to comments critical of the Corps' draft supplemental EIS, because these comments were not integrated into the body of the final supplemental EIS. The Resources Council relies on a CEQ regulation that requires discussion "at appropriate points in the final [EIS of] any responsible opposing view." 40 C.F.R. § 1502.9(b). The Resources Council argues that the only

"appropriate points" in an EIS for discussion of opposing views are in the body.

We first note that section 1502.9(b) does not define "appropriate points."[10] We must therefore examine that guideline and the Corps' final supplemental EIS in light of the purposes of an environmental impact statement of providing complete information to the decisionmaker and the public.

We find that an agency may place responsible opposing views in a separate "comments and responses" section when, as here, many of the critical comments prompted revisions in the body, the Corps discussed in the body all of the environmental problems to which the comments were addressed, and the Corps provided thoughtful and well-reasoned responses to most of the critical comments. We therefore hold that the Corps sufficiently complied with the purposes of the NEPA in its treatment of opposing views, even if the most "appropriate points" for addressing those views would be in the body.[11]

Second, the Resources Council contends that the final supplemental EIS is inadequate because it fails to discuss, as required by 40 C.F.R. § 1502.16(c), possible conflicts between the proposed action and other federal policy objectives for the affected area. Specifically, the Resources

[10] As originally drafted, section 1502.9(b) read: "In the final statement the agency shall discuss at appropriate points in the text the existence of any responsible opposing view . . . ." 43 Fed. Reg. 25,237 (1978). Because the deletion of the words "in the text" was not accompanied by an explanation, *see* 43 Fed. Reg. 55,995 (1978), it is unclear whether the CEQ intended the change to affect the meaning of "appropriate points."

[11] Moreover, to the extent that the critical responses of the state and federal agencies were merely "substantive comments," rather than "responsible opposing views," the Corps was not required to discuss the comments in the text. *See* 40 C.F.R. § 1503.4(b).

Council argues that the agency failed to analyze the effect of the dam on the wild and scenic portion of the Rogue River, located fifty-seven miles downstream. An EIS need contain only a reasonably thorough discussion of the significant aspects of the probable environmental consequences of a proposed action. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)).

In this case, the United States Forest Service commented that the final supplemental EIS should address the effect of the project on the wild and scenic portion of the river. The Corps responded that, based on its conclusion that the impact on the immediate downstream portion of the river would be insignificant, the impact on the wild and scenic portion fifty-seven miles downstream also would be insignificant. The agency assumed that the reservoirs' impacts diminish with distance.

Applying this court's "rule of reason," *see Enos*, 769 F.2d at 1372, the agency logically concluded that the impact from the project on the wild and scenic portion of the river would be insignificant.[12] Assuming the agency reaches the same conclusion concerning the immediate downstream portion of the river after it takes into consideration the new information, its decision concerning the wild and scenic portion of the river will stand.

Third, the Resources Council contends that the final supplemental EIS is defective because the Corps placed a

[12] The Resources Council contends that the agency's assumption violates 40 C.F.R. § 1502.24, which requires agencies to identify any methodologies used and to make explicit reference by footnote to the scientific and other sources relied on for conclusions in the statement. We disagree. The regulation is satisfied here because the Corps identified the methodologies used and sources relied on for its conclusions concerning the immediate downstream portion of the stream. This was sufficient to support its decision concerning the wild and scenic portion of the river.

cost-benefit analysis of the Elk Creek Project using a 3¼% discount rate in the body, but relegated an analysis based on a more realistic 7½% rate to an appendix. The Resources Council argues that the placement of these analyses misled the decisionmaker as to the economic value of the project.

An EIS is not required to contain a formal, mathematically expressed cost-benefit analysis. *California v. Block*, 690 F.2d at 764. Nevertheless, if such an analysis is included, it should not be misleading. *See Johnston v. Davis*, 698 F.2d 1088, 1094 (10th Cir.1983).

We find that the Corps' use of a 3¼% discount rate or its placement of the 7½% cost-benefit analysis in an appendix was not misleading. The Water Resources Development Act of 1974, Pub.L. No. 93-251, § 80, 88 Stat. 34 (1974) (codified at 42 U.S.C. § 1962d-17(b)), required use of the 3¼% discount rate. *Johnston*, 698 F.2d at 1092-95. The Corps' inclusion of the analysis based on the more realistic 7½% comported with CEQ guidelines. *See* 40 C.F.R. § 1502.23 (cost-benefit analysis "shall be incorporated by reference or appended to the statement"). Moreover, although the purposes of an EIS might have been better served if the 3¼% analysis in the body had made reference to the 7½% analysis in the appendix, the inclusion of the latter analysis sufficiently cured whatever misleading effects resulted from use of the 3¼ percent rate. *Cf. Enos*, 769 F.2d at 1375 n. 14.

VII.

We conclude that the Corps' mitigation report is inadequate, and that the Corps should file a new supplemental EIS because of new information obtained. The Corps also must prepare a worst case analysis or conduct further

research with regard to the waterflow contribution from Elk Creek. The Corps also should conduct a worst case analysis based on the new information submitted in the two studies, if necessary. Finally, although the Corps need not prepare a separate statement addressing the cumulative impact of the dams, it should supplement the statement and address the cumulative impact of Lost Creek and Elk Creek Dams and, if appropriate, Applegate River Dam. We therefore remand to the district court for entry of appropriate injunctive relief in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I concur in parts II and V of the majority opinion. I concur in part IV except for the statement in the final paragraph that the Corps must consider the "new information" provided by the reports discussed in part III in reaching its decision concerning a worst case analysis. With respect to part VI, I concur in the result only because some unnecessary language keeps me from fully joining that part of the opinion. I dissent from part III.

I

I am unable to agree with the majority's conclusion in part III regarding the need for a new supplemental environmental impact statement (EIS). As the majority points out, we will uphold an agency's decision not to supplement an EIS in light of new information if the decision is reasonable. *Enos v. Marsh*, 769 F.2d 1363, 1373 (9th Cir. 1985). As the majority also observes, reasonableness

depends on four factors: "[1] the environmental significance of the new information, [2] the probable accuracy of the information, [3] the degree of care with which the agency considered the information and evaluated its impact, and [4] the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data." *Stop H-3 Association v. Dole*, 740 F.2d 1442, 1464 (9th Cir. 1984) (*Stop H-3*), *cert. denied*, 471 U.S. 1108 (1985). I believe that the proper application of each of the four factors, as mandated by *Stop H-3*, to the two studies cited by the majority leads to the conclusion that the Corps' decision was reasonable. I will treat each of the two studies separately.

A.

The first study was performed by the Oregon Department of Fish & Wildlife (Department). It argued that the construction of the dam would increase turbidity, water temperature, and the prevalence of epizootic diseases, with deleterious effects on the fish population in the Rogue River. I agree that the data provided in the Department's report, if accurate, are significant. I question, however, the report's accuracy.

In order to apply the four *Stop H-3* factors, we must first examine the relevant evidence in the administrative record. The Corps had the report examined by two independent experts. One of these experts, a professor at the University of Washington School of Fisheries, filed an extensive and highly critical review of the report. Though this review admitted that some of the conclusions in the Department's study were valid, it also indicated that the study contained "considerable statistical inaccuracies, over-extension of statistical methods, and undue biological speculation"; reported that other conclusions of

the study, though apparently valid as far as they went, were not statistically significant; disagreed with some of the study's interpretations of causation; questioned the strength of the study's data and the accuracy of the models it used in reaching its conclusions; dimissed some statements from the report as "spurious" and others as "speculation . . . [that was] unfounded"; and accused the authors of the study of throwing out data that did not fit their conclusions.

The second independent expert to evaluate the study was less negative in his assessment. He stated that the study's base methodology of comparing pre- and post-dam conditions was "not likely to yield conclusive results" and that the Department's model was based on "limited data over only a few years," which substantially increased the likelihood of "chance relationships." He also pointed out internal contradictions in the report.

The Corps's own expert at the Waterways Experimental Station in Vicksburg, Mississippi, observed that the study's authors had admitted that they had worked with very limited data and "were stretching" their methodology and that their report, therefore, was likely to contain some inaccurate conclusions. These shortcomings, the Vicksburg report stated "must be considered when assessing the predictive value of the information provided by the [Department]." The Corps' expert also said that the report's conclusions were based upon an insufficient number of observations and that the report treated dependent variables inconsistently.

Deposition testimony in this case presents a similar picture. Steven Cramer, the Department's program leader for the Rogue Basin Evaluation project, testified that, despite attempts at testing, the Department had been unable to confirm that the Lost Creek dam, which had served as a basis for the Department's comparison of pre- and post-

dam conditions, was responsible for the increase in epizootics that had led to rises in fish mortality there. Cramer also admitted that the Department had not adequately tested the possibility that diseased hatchery fish, not dam construction, might have been what transmitted epizootics to the wild chinook salmon.

Cramer also admitted that there had been no unusual fish mortality since 1981, and that his calculations on fry survivability might be "inaccurate." He had earlier revised his estimates on fry mortality due to temperature increases from the 60-80% to the 35-40% range. He also conceded that his calculations ignored the probable beneficial effect that the proposed dam's regulation of peak flows would have on fry survivability. Indeed, the Department had previously admitted that the dam would probably also have beneficial effects that would reduce fry mortality.

Furthermore, the Department's District Fish Biologist for the Upper Rogue Basin testified that temperature increases were "at this time . . . not as much of a concern" as before, since proper reservoir management could obviate problems. Apparently, water temperatures would increase enough to endanger fry hatching only if a high volume of water were released.

There is also evidence that the Corps sought to respond to most of the Department's concerns about the construction of the proposed dam. On October 11, 1983, the Corps issued a written response to questions raised by various groups regarding the dam which explicitly addressed the Department's concern over increased turbidity, indicating that proper dam management would minimize increases in turbidity in the Rogue. In addition, Corps' analyst Dortch indicated that he had applied accurate models and found that the dam would have little effect on temperatures in the Rogue River because Elk Creek contributed only a small proportion of the Rogue's water. It is not clear,

however, whether the Corps ever transmitted the results of this study to the Department. There is also no evidence that the Corps responded in any way to the Department's concern regarding increased in epizootics.

On the basis of this evidentary background, we can apply the four factors delineated in *Stop H-3* to determine the reasonableness of the agency's decision not to issue a supplemental EIS. The first factor is the "environmental significance" of the new data at issue. The data provided in the Department's study, if accurate, would indeed be significant. The second factor is the "probable accuracy of the information." *Stop H-3*, 740 F.2d at 1464. As is evident from the foregoing, much of the information in the Department's study is of a highly questionable accuracy at best, and the Corps had good reason, based on its own analysis and that of two independent experts, to doubt the validity of the study's conclusions. Even the majority is forced to admit that the Department's evidence on fry survivability, turbidity, and epizootics was "not conclusive." Majority op. at 12. The third factor is the "degree of care with which the agency considered the information and evaluated its impact." *Stop H-3*, 740 F.2d at 1464. The Corps exercised a high degree of care in considering the Department study, submitting it for assessment and review not only to its own analyst, but to two outside experts as well. In addition, in response to the concerns that the Department had raised, the Corps also apparently tried to develop a new model to serve as a basis for assessing some of the environmental effects of the construction of the proposed dam, evidently with some success. Moreover, as the majority points out, the Corps is continuing to review the concerns raised in the Department's study. The fourth factor is the "degree to which the agency supported its decision not to supplement with a statement of explanation or additional data." *Stop H-3*, 740 F.2d at 1464. As

outlined above, the Corps provided a formal response to the Department regarding one of the three major concerns raised in its study: increased turbidity. It also performed additional analytical testing to assess the damage of increased temperatures, though it evidently did not publish the results of this testing or transmit them to the Department, as the wording of the fourth factor in *Stop H-3* would imply it should.

Considering all of these factors together, I cannot agree with the majority's conclusion that the Corps' decision not to issue a supplementary EIS in response to the Department's study is unreasonable. In view of the dubious nature of so many of the study's conclusions and the care with which the Corps examined the concerns raised in the study, its decision seems to me to have been reasonable.

B.

I am less confident that the United States Soil Conservation Service (Conservation Service) report is significant even if it is accurate. That report indicated the presence of much greater amounts of high sediment-producing type soils in the vicinity of the Elk Creek dam site than the Corps had estimated. However, the Corps' expert testified that the Conservation Service's study had been based on a completely different methodology and addressed different objectives than the Corps' own study. He claimed that the Corps' study had concentrated on predicting water-sediment levels rather than merely noting soil types and that the Corps had developed an experience-based model that predicted lower resultant turbidities than the mere examination of soil types might lead one to expect.

The area soils scientist of the United States Geological Survey testified that some 83% of the shore of the lake that the proposed Elk Creek dam would produce would be

of a high sediment-producing type. Nevertheless, the experience-based model the Corps had applied to the Elk Creek site had also been applied to the existing Lost Creek dam area and had turned out actually to have *over*-predicted resultant turbidity there. The Corps contemplated depositing gravel on trouble areas on the shoreline of the future lake in order to halt erosion and further reduce expected resultant turbidity. The area soils scientist also testified that, in his opinion, the Corps had taken a "hard look" at the concerns he had raised regarding turbidity, even though he felt that the Corps' conclusions contained "small inaccuracies."

With respect to the first *Stop H-3* factor, the Corps had good reason to question whether the Conservation Service's report was even significant, since the Corps had considerable empirical evidence that soil type and turbidity are not, in actuality, as directly related as the report assumed. As for the second *Stop H-3* factor, the reports about soil type are apparently accurate, but this really matters very little if they are not accurate predictors of turbidity. Nor do I think that the application of the third prong of *Stop H-3* supports a holding that the Corps acted unreasonably: the Corps apparently performed no new studies in response to the Conservation Service report, but the Corps did compare the Conservation Service study to the results produced by its own model which *over*-predicted turbidity rather than underpredicting it. The Corps seems to have had good reason to conclude that the concerns of the Conservation Service study were unfounded. As for the fourth *Stop H-3* factor, there was, evidently, no direct response by the Corps to the Conservation Service. Considering all four factors together, I disagree with the majority's conclusion that the Corps' decision not to issue a supplemental EIS in response to the

Conservation Service study was "unreasonable" in these circumstances.

It is not the function of this court to decide whether the Corps' analysis of the two studies was "correct" scientifically. Whether or not it was, the record certainly seems to show that the Corps' decision not to issue a supplemental EIS was reasonable according to the four factors that we must apply under the rule of *Stop H-3*.

II

In part VI, the majority chooses to tackle the issue of whether responses to critical comments need be integrated into the body of an EIS or can simply be put at the end. The relevant regulation requires that criticisms be addressed at "appropriate points in the final statement." 40 C.F.R. § 1502.9(b) (1986). As the majority points out, the proposed version of this regulation had required that responses be "in the text," but this phrase was amended. Majority op. at 14 n.7. I conclude, therefore, that both the plain language of the regulation and its "legislative" history clearly indicate that criticisms need only be addressed somewhere in the EIS.

The Resources Council's only contention is that putting responses to criticism in a separate "comments and responses" section is automatically invalid. The regulation clearly indicates otherwise. That should end the issue. There is no need to look further, as the majority does, to determine in which cases a separate comments section might be an "appropriate point." The Resources Council does not contend that even if including responses in a separate comments section is valid as a general rule, it is not valid in this case because the responses were tucked away in an inappropriately obscure portion of the statement. Because the Resources Council has pointed to no

violation of the regulation in this case, it seems inappropriate for us to develop a rule ("We find that an agency may place responsible opposing views . . . ," majority op. at 18). The proper approach would also eliminate the necessity of trying to create a distinction between "substantive comments" and "responsible opposing views," as the majority is forced to do. Majority op. at 15-16 n.8.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 85-6433-E

OREGON NATURAL RESOURCES COUNCIL, ET AL., PLAINTIFF

v.

JOHN O. MARSH, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, ET AL., DEFENDANTS

[Feb. 28, 1986]

OPINION AND ORDER

I. INTRODUCTION

Oregon Natural Resources Council (ONRC) brought this action to enjoin the Corps of Engineer's (Corps) construction of a dam at Elk Creek in the Rogue River Basin in Southern Oregon. ONRC sought a preliminary injunction; the Corps opposed this motion, and also responded with a motion for summary judgment.

ONRC initially charged the Corps with violating both the National Environmental Policy Act (NEPA) and the Wild and Scenic Rivers Act (WASRA).[1] Prior to the hearing on the motion for preliminary injunction, ONRC withdrew its WASRA claim.[2] At issue here, therefore, is

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[1] ONRC's complaint also alleges that the Corps violated the Freedom of Information Act relative to ONRC's request for information of the Elk Creek project. That issue is not addressed in this opinion. It will be decided at a later date.

[2] WASRA, 16 U.S.C. § 1278, (§ 7(a)), requires the Secretary of the Interior to determine whether a water resources project would have an

only whether the Corps violated the requirements of NEPA in the preparation of its Final Environmental Impact Statement Supplement (FEISS) on the Elk Creek project.

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adverse environmental effect on any river established as a wild and scenic river. The proposed Elk Creek dam is 57 miles upstream from the designated wild and scenic portion of the Rogue River. In accordance with WASRA requirements the Corps notified the Secretary of Interior of the Elk Creek project when the FEISS was complete.

On January 19, 1981 then Secretary of Interior, Cecil Andrus, responded with a letter stating that he had determined "that the project is unsatisfactory from the standpoint of public welfare and environmental quality." After listing nine environmental concerns relative to the dam's construction the Secretary concluded that "the benefits projected to be derived from completion of this project do not justify its completion. Clearly, abandoning this project would be consistent with our national efforts to protect our natural environment and to make wise use of tax dollars derived from all our Nation's citizens." (A.R. 8(a)). ONRC based its WASRA claim on this letter.

ONRC apparently was not, at the time it filed this case, familiar with a follow-up letter of April 2, 1981 from Donald Hodel, then Under/Secretary of the Interior, under James Watt who had replaced Cecil Andrus. In that letter the Under/Secretary stated that the January 19, 1981 letter "may contain serious errors" and "may have been based, at least in part, on inadequate data." Accordingly, he withdrew all comments and conclusions for reevaluation. (A.R. 13).

That letter was followed by a July, 1981 letter which concluded, in part, that "[T]he January 19, 1981 letter from the DOI included criticisms of the project which were either not sustainable on further review, or went beyond responsibilities of the DOI." Thus, the DOI withdrew any criticism of the project. (A.R. 16).

Because the DOI did not determine that the project would have an adverse environmental effect on the wild and scenic portion of the Rogue River, ONRC could not state a claim under § 7(a) of WASRA. Therefore, upon learning of the DOI's withdrawal of objection to the project, ONRC chose not to pursue its WASRA claim. (Plaintiff's Brief in Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 1. fn.1.)

A hearing was held on January 16, 1986, at which, after testimony was taken and oral argument had, I gave a brief oral opinion denying ONRC's motion for preliminary injunction. I advised the parties I would issue a written opinion addressing both ONRC's motion for preliminary injunction and the Corps' motion for summary judgment.

FACTS

The parties have thoroughly canvassed the facts (largely undisputed) of this case. The voluminous administrative record also contains a detailed accounting of the facts.[3] It is, therefore, unnecessary to review the facts in detail for either party's benefit. Any reader desiring more detail may consult the entire record filed with the court.

Briefly, the construction of the Elk Creek Dam was authorized in 1962 as part of a three dam Rogue River Basin project. The project's primary purpose was to control flooding in the Rogue River Basin in Southern Oregon. The other two dams, Lost Creek Dam and Applegate Dam, have already been completed.

The Corps completed an Environmental Impact Statement (EIS) on the Elk Creek dam in 1971. After conducting further studies on the turbidity potential of the proposed construction the Corps drafted a supplemental (EISS) in 1975. However, because of controversy over the environmental effects of the project the Governor of Oregon withdrew the state's support and requested that work be suspended until the Corps could evaluate the effects of the Lost Creek dam on the water quality in the Rogue River. The 1975 draft EISS was never finalized.

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[3] The Administrative Record (A.R.) is a comprehensive compilation of the documents relevant to the Corps' decisions regarding the proposed Elk Creek project. The entire A.R. is part of the case record filed with the court.

After studying the water quality effects of the Lost Creek Dam, the Corps prepared another draft EISS in 1980. After public comments and response, that EISS was finalized (FEISS) in December, 1980.

In February, 1982 the Corp issued a Record of Decision for the Dam's construction, subject to Congressional authorization. A § 404 Water Quality study was conducted and completed in October, 1983.[4] Also during that year the dam's structure was redesigned to lower the anticipated water temperatures. An Environmental Assessment (EA), Finding of No Significant Impact (FONSI), and a Supplemental Information Report (SIR) were completed on those changes.

Despite the Division Engineer's Decision of Record recommending construction of the dam, the Corps did not seek funding for it. Nevertheless, in August, 1985, after five years of extensive testimony (before the relevant committees) and study regarding Elk Creek, Congress appropriated moneys and directed the Corps to build the dam.[5] ONRC then filed this suit to enjoin the dam's construction.

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[4] Section 404 of the Clean Water Act requires the Corps to evaluate for water quality all projects which will discharge fill material into navigable waters. The Elk Creek § 404 evaluation, along with comments and responses, is set out at A.R. 19-19n.

[5] Testimony from the hearing conducted by both the House and Senate appropriations [*sic*] Subcommittees on Energy and Water development [*sic*] Appropriations from 1980-85 relative to the Elk Creek project are set out in A.R. 37-47. The Supplemental Appropriations Act, P.L. 99-88, signed by the President August 15, 1985 appropriates funds for the main dam at Elk Creek.

In addition to the appropriations, the Senate Report on the Supplemental Appropriations Bill, S.99-82, 99th Cong. 1st Sess 97 (1985) specifically directs that the dam construction begin:

Elk Creek, Or.—The Congress in action on the 1985 Energy and Water appropriations bill, Public Law 98-360 directed the Corps of

II. DISCUSSION – PRELIMINARY INJUNCTION STANDARDS

This circuit has adopted two alternative tests to determine whether a preliminary injunction should be issued:

> The first test requires that a court find 1) the moving party will suffer irreparable injury if the injunctive relief is not granted; 2) there is a substantial likelihood that the moving party will succeed on the merits; 3) in balancing the equities the nonmoving party will not be harmed more than the moving party is helped; and 4) granting injunctive relief is in the public interest. . . . The second test requires the moving party to demonstrate either 1) a combination of probable success on the merits and the possibility of irreparable harm; or 2) that serious questions are raised and the balance of hardships tips sharply in his favor.

City of Tenakee Spring v. Block, ___ F.2d ___ No. 84-3883, slip op. at 12-13 (9th Cir. Dec. 20, 1985).

Engineers to resume construction of the Elk Creek Lake project. Notwithstanding this specific legislative language, the Corps has not proceeded to carry out the congressional intent on this project.

The Committee notes that the entire $10,000,000 appropriated in Public Law 98-360 for the Elk Creek Lake, Or. project was used for the award of a lump sum contract for relocation of roads and that none of the appropriated funds have been used for construction of the main dam as envisioned.

The Committee, therefore, has included specific language in the legislation directing the Secretary of the Army, acting through the Chief of Engineers, to award a continuing contract for construction of the main dam for the Elk Creek Lake project, as authorized in Public Law 87-874. To further strengthen this direction and to make absolutely clear the Committee intent, an additional $15,000,000 has been appropriated, to remain available until expended, so there will be no impediment to proceeding of the main dam of the Elk Creek Lake project.

Under either test ONRC must establish a likelihood, or at least serious questions, that the Corps violated NEPA requirements in preparing its final EIS.

"The purpose of NEPA is to assure that federal agencies are fully aware of the impact of their decision on the environment." *Friends of the Endangered Species v. Jantzen*, 760 F.2d 967, 985 (9th Cir. 1985). To satisfy this purpose, NEPA requires that federal agencies undertaking projects with significant environmental consequences must identify and discuss all those foreseeable environmental consequences in an EIS. 42 U.S.C. § 4332.[6]

An EIS serves two basic purposes. It a) "should provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences" and b) "the impact statement should provide the public with information on the environmental impact of a proposed project as well as encourage public par-

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[6] Section 102 of NEPA, 42 U.S.C. § 4332, states in part:

> The Congress authorizes and directs that, to the fullest extent possible: (2) all agencies of the Federal Government shall –
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action;
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (iii) alternatives to the proposed action;
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

ticipation in the development of that information." *Trout Unlimited, Inc. v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

> In reviewing an agency's compliance with NEPA I am required
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> to employ a "rule of reason" that inquires whether an EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Trout Unlimited, Inc. v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). This standard is not susceptible to refined calibration. It instead requires a reviewing court to make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation. *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977) (per curiam); *Trout Unlimited, Inc.*, 509 F.2d at 1283. This standard of review, however, does not authorize a reviewing court to substitute its judgment for that of the agency concerning the wisdom or prudence of a proposed action. Once satisfied that a proposing agency has taken a "hard look" at the decisions [*sic*] environmental consequences, the review is at an end. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S.Ct. 2718, 2730 n.21, 49 L.Ed.2d 576 (1976).

California v. Block, 690 F.2d 753, 761 (9th Cir. 1985).

In this case, to state it in over-simplified fashion, I should enjoin construction of Elk Creek Dam only if the Corps has not taken a "hard look" at it.

ONRC claims that the Corps has violated NEPA by 1) failing to consider the cumulative effects of the Rogue River Basin Project in a single EIS; 2) failing to adequately describe the area affected by the project; 3) failing to adequately describe the environmental consequences of the project; 4) failing to provide a clear basis for choice among reasonable alternative; 5) failing to comply with their disclosure and research duties under the worst case analysis; and 6) failing to prepare a new supplemental EIS. ONRC's claims are all rejected.

A. Cumulative Impact

ONRC first claims that the Corps has not adequately considered the cumulative impact of the Elk Creek Dam in conjunction with the rest of the Rogue River Basin Project.

The cumulative impact is "the impact on the environment which results from the incremental impact of an action when added to the other past, present and foreseeable future actions regardless of what agency or person undertakes such actions." 40 C.F.R. § 1508.7. ONRC argues that the cumulative impacts of the three dam Rogue River Basin Project must now be considered in a single EIS. I disagree.

In a prospective project consisting of connected, dependent actions, a single EIS is necessary to adequately assess the cumulative impact of the entire project. *See Northwest Indian Cemetery Protective Association v. Peterson*, 764 F.2d 581 (9th Cir. 1985). (EIS which did not address the cumulative effects of a proposed road construction project and related timber harvesting project on water quality was inadequate); and *Thomas v. Peterson*, 753 F.2d 754, (9th Cir. 1985). (Where "timber sales cannot proceed without the road, and the road would not be built without the contemplated timber sales", EIS which did not address the cumulative impact of the two proposed projects was inadequate. *Id.* at 758.)

However, the Rogue River Basin Project is nearly complete. To retrospectively compile a single EIS on the entire project would be illogical.[7] Rather, the more valuable tool

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[7] This is not to say that the Corps is in any way relieved from its obligation to continue monitoring the environmental effects of Lost

in assessing the environmental consequences of the proposed Elk Creek Dam is an analysis of the cumulative impact of this dam when added to the existing components of the project. The Corps has done this.

The FEISS describes and analyzes the Elk Creek Dam as the third and final step in the Rogue River Basin Project. Integral to the description of the construction and operation of the Elk Creek portion of the project is its interrelationship with the other dams in the project. Likewise, the environmental impacts to the water quality, aquatic biology, wildlife and land use of the dam are analyzed in terms of the effects of the entire project. I am convinced that the Corps took a hard look at the cumulative environmental impacts of the Elk Creek Dam as the last step in the Rogue River Basin project.

B. Affected Area

ONRC next argues that the FEISS is inadequate because it fails to adequately describe the affected areas as required by 40 C.F.R. § 1502.15. Specifically ONRC alleges error in the Corps' failure to discuss the proximity of the dam to the Wild and Scenic area of the Rogue River and in the Corps' description of the geology, soils and slope stability in the area around the dam.

The EIS must be sufficiently detailed to apprise the substantive decision-makers of the potential environmental consequences of the project. *Trout Unlimited*, 509 F.2d at 1283. The agency's analysis of the affected area should

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Creek and Applegate Dams and to mitigate environmental harm to the greatest extent possible. However, the nature and purpose of an EIS is prospective: to give the decision makers an adequate and realistic assessment of a proposed action from which they can determine whether to proceed. The purpose of EIS could not be served by compiling such a statement on a completed project.

provide the decision-makers with an accurate basis from which to evaluate those consequences.

That the Corps did not specify in the body of the FEISS the proximity of the dam to the Wild and Scenic area of the Rogue River, located 57 miles downstream, does not render its analysis inadequate. Based on its water quality studies, the Corps determined that the project's impact on the wild and scenic area, if any, would be insignificant. Thus, the Corps concluded that it was unnecessary to specify the proximity of the Wild and Scenic area in the FEISS.

Its proximity to the dam is, nevertheless, discussed in the comment and response section of the FEISS. Thus, even if the Corps erred in not analyzing it in the body of the FEISS, the Corps, as decision-maker and the Congress as well, was aware of the dam's proximity to the Rogue's Wild and Scenic section when the final decision was made.

The FEISS soils description also meets the NEPA requirements. Incorporating the 1975 Rogue Basin Water Temperature and Turbidity Report, which contains an extensive soils analysis, and the 1979 Water Quality Update Study, which identifies and describes the soil types and their susceptibility to slides, the FEISS thoroughly discusses the condition of the soils in the affected area. It also sufficiently recognizes the potential problems in the slope stability and turbidity levels. Criticism of the Corps' analysis is contained in the comment and response section of the FEISS, thereby alerting Congress to the conflict of opinion relative to the soils description. I find that the descriptions show that the Corps took a hard look at the soil conditions and the FEISS descriptions and comments are adequate to apprise Congress of those conditions.

C. Environmental Consequences

40 C.F.R. § 1502.16 requires that the EIS contain a discussion of the environmental consequences of the proposed action. The Corps must include in that discussion the indirect effects and their significance, the possible conflicts between the proposed action and other federal mandates and the means to mitigate adverse environmental impacts. ONRC alleges that the Corps has failed to satisfy these requirements.

ONRC alleges that the Corps did not adequately discuss the environmental consequences of the downstream turbidity and its effect on fish production and angling.

The Corps' studies on the project's effects on downstream turbidity, including the effects on fish and angling, are documented in the 1974 Rogue River Basin Temperature and Turbidity Report and the 1979 Water Quality Study; and the FEISS. Conflicts of opinion, however, persist. While the Corps is required to identify opposing views found in the comments, so differences of opinion are readily apparent, it is not required to resolve conflicts raised by opposing viewpoints. *California v. Block,* 690 F.2d at 773; *Warm Springs Dam Task Force,* 565 F.2d at 554. That the "EIS promotes both informed decision-making and public participation" is the requirement of NEPA. *Enos v. Marsh,* 769 F.2d 1363, 1372 (9th Cir. 1985). The Corps' comprehensive study and its recognition of the persisting conflicts satisfy that requirement.

ONRC next argues that the Corps failed to discuss the indirect effects and their significance by failing to discuss the relationship between short-term uses of the environment and long-term productivity or any irreversible or irretrievable commitment of resources caused by the project.

Chapter 4 of the FEISS, entitled "Environmental Effects of the Proposed Action," adequately addresses these concerns.

ONRC also argues that the Corps was required to discuss the possible conflicts between the proposed dam construction and the requirements of WASRA, and that the FEISS was inadequate because of the Corps' failure to do so. I disagree.

As previously discussed, the Corps determined that the dam would not significantly affect the wild and scenic portion of the Rogue River. This conclusion was substantiated when the Secretary of the Interior notified the Corps shortly after the FEISS was completed that the dam would not conflict with the WASRA requirements relative to the wild and scenic portion of the Rogue.[8] Congress was aware of the dam's proximity to the wild and scenic portion of the Rogue and the Corps' failure to examine the environmental consequences of that proximity in the FEISS was not in error.

Finally, ONRC argues that the Corp's mitigation measures are inadequate.

It is true, as ONRC asserts, that the mere listing of mitigation measures in an EIS is inadequate to satisfy the NEPA requirement. *Northwest Cemetery Protective Association,* 764 F.2d at 588. However, in this case, for every adverse environmental effect the Corps has developed, or is developing, mitigation measures to minimize or alleviate the potential damage.[9]

NEPA does not require that the Corps reject all projects that have any adverse environmental effects, nor does it

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[8] *See* footnote 2, supra.

[9] *See e.g.*, discussion of Cole M. River's Fish Hatchery, A.R. 7 at 35 which is designed to mitigate loss of anadromous fish-spawning habitat in Elk Creek, Applegate River and Upper Rogue, and to

require the Corps to completely co[m]pensate for them. Rather, NEPA requires that the Corps recognize the adverse environmental effects that cannot be avoided and mitigate those effects to the greatest extent possible. *Friends of the Endangered Species v. Jantzen*, 760 F.2d at 987. *See also Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985). I find that the Corps' mitigation plans satisfy that obligation.

D. Cost-Benefit Ratio

ONRC argues that the Corps failed to provide a clear basis for choice among reasonable alternatives as required by 40 C.F.R. § 1502.14.[10] It bases this argument on the Corps's use of the 3¼% interest rate to calculate the cost benefit ratio to the project.

"An EIS cost benefit analysis is sufficient if it gives the decision makers and other readers enough detail concern-

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mitigate lost trout production by providing rainbow trout and kokanee for stocking in reservoirs.

At the preliminary injunction hearing, Ron Garst, Senior Staff Biologist for the U.S. Fish and Wildlife Service, testified that the Corps is interested in wildlife habitat mitigation. USFW is currently assessing loss of wildlife habitat mitigation plan. *See also* Plaintiff's Amended Witness List, Ron Garst testimony summary.

[10] 40 C.F.R. § 1502.14 requires, in part that:

> Based on the information and analysis present in the sections on the Affected Environment (§ 1502.15) and Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public.

ONRC does not challenge the alternatives the Corps included in its EIS. Rather, ONRC argues that, because of the Corps' reliance on the 3¼% discount rate, it did not provide the decision-makers with a clear basis for choice among the options.

ing all of these costs and benefits [of a proposed project] to permit a reasoned evaluation and decision." *South La. Env. Council v. Sand*, 629 F.2d 1005 (5th Cir. 1980).

ONRC correctly explains that "An unreasonable comparison of alternatives does result where an EIS pretends that a cost benefit analysis of the basin project, using an artificially low discount rate represents a realistic assessment of the economic value of the proposed action." (Plaintiff's memorandum in support of motion for preliminary injunction, p. 19, *citing Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983)). ONRC then asserts that "the SEIS here pretended that its cost benefit analysis of the basin project, using the same artificially low discount rate, [of 3¼%] represented a realistic assessment of the economic value of the proposed action. And, as in *Johnston v. Davis*, the SEIS suggested without qualification that the project would produce net economic benefits, making no mention of the artificially low discount rate." ONRC's assertion is incorrect.

While the Corps used an artificially low discount rate of 3¼%, as required by law,[11] it did not represent that as a realistic assessment of the value of the proposed action. Rather, the Corps also evaluated the project under the currently required 7½% discount rate and included both calculations in an incremental cost-benefit analysis which was included in the FEISS. That cost benefit analysis showed the economic justification for the project was shaky.

Congress was fully aware of the realistic assessment of the economic justification for the project when it directed that the dam be constructed. It is not my role to review or reevaluate Congress' decision. *Enos v. Marsh*, 769 F.2d at

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[11] 42 U.S.C. § 1962(d)-17(b).

1375.[12] As the 5th Circuit Appeals Court aptly concluded in *Sand*:

> If we were to review the factors of the Corps' economic benefit analysis in the plenary fashion requested by plaintiffs, all chaos wouid ensue . . . Projects such as the one considered here have an extremely long gestation period. This particular project has undergone studies since its inception in 1968. Over time, the economic realities do change. But once Congress has authorized a project, it is not for the courts to review its economic justification. Congress has allowed limited review of such projects under NEPA but we are to evaluate the economic justification only if it has become so flawed that it grossly distorts the environmental consideration. . . Barring the extreme case, it is for Congress to determine when to reevaluate the economic justification for a particular project. After just such a reevaluation, this project was continued. We refuse to substitute our judgment for that of Congress and the Corps.

Sand, 629 F.2d at 1015.

This is not an extreme case. Congress was not misled by the Corps' use of the 3¼% discount rate. The Corps presented Congress with a realistic assessment of the project and a clear basis for choice among reasonable alternatives. Thus, ONRC's allegation is without merit.

E. Worst Case Analysis

ONRC next argues that the Corps failed to comply with their disclosure and research duties under the worst case analysis regulation.

An agency must conduct a worst case analysis "when the information relevant to the adverse impacts is essen-

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[12] In Plaintiff's Brief in Reply to Defendants' Memorandum In Opposition to Plaintiff's Motion for Preliminary Injunction, ONRC argues that *Enos* v. *Marsh* "is inapposite," ONRC argues that *Enos* holds that "Congressional action upon a specific cost benefit analysis forecloses judicial review of that analysis *but only* for purposes of assessing the agency's compliance with the Water Resources Development Act." (Emphasis added). To support this statement ONRC quotes *Enos* as noting that "violations based upon invalid use of the WRDA discount rate formula under NEPA and WRDA are distinct." ONRC has taken this quote out of context.

In *Enos* the court noted that the "WRDA discount rate formula is applicable to the EIS" but, because they are separate acts, claims of violations of the two Acts must be alleged separately. Enos challenged the 3¼% discount rate in the EIS for the first time on appeal. Therefore the court refused to hear the NEPA claim, noting, as ONRC quoted, that they are distinct violations.

While the WRDA violation was the only one at issue in *Enos* the court did not hold that Congressional action on a cost benefit analysis *only* foreclosed judicial review of WRDA violations. The Enos court stated that "Plaintiff concedes that Congressional action based upon a specific cost benefit analysis forecloses judicial review of that analysis." The Court cited three cases for that proposition: *Izaak Walton League of America,* 655 F.2d 346 (D.C. Cir.[),] *cert. denied,* 454 U.S. 1092 (1981); *Environmental Defense Fund Inc. v. Corps of Engineers,* 492 F.2d 1123 (5th Cir. 1974); and *South La. Envtl. Council v. Sand,* 629 F.2d 1005 (5th Cir. 1980). Two of those three cases (*EDF* and *Sand*) were based on alleged NEPA violations.

Even though the court did not entertain the NEPA challenge on appeal it nevertheless went on to note that "in its 1976 EIS, the Corps also included a cost-benefit ratio based upon the discount rate of 6-3/8%, thereby fulfilling the substantive purpose of NEPA to inform the decision-makers and the public of the realistic consequences of agency actions."

The Corp had done essentially the same thing in this case, including a 7½% discount rate in addition to the statutorily required 3¼%. I cannot understand how ONRC can think *Enos* is inapposite. For the principal for which it was cited, it appears to be directly analogous to this situation.

tial . . . and is not known and the overall cost of obtaining it are exorbitant or . . . the information . . . is important and the means to obtain it are not known." *Save Our Ecosystems v. Clark,* 747 F.2d 1240 (9th Cir. 1984), *citing* 40 C.F.R. § 1502.22.

ONRC argues that this regulation requires the Corps to expose the scientific uncertainty with respect to the downstream turbidity, fish population and fishing, and the uncertainty of the studies results relative to the project's overall turbidity level. I disagree.

The Corps conducted studies on the turbidity potential resulting from the dam using state of the art modelling techniques.[13] The Corps concluded that, from a technical and scientific standpoint, its predictions were reliable. It, therefore, did not indicate a scientific uncertainty or conduct a worst case analysis in its FEISS. The FEISS does, however, include the comments of others who questioned the accuracy of the Corps' testing techniques. If uncertainty does, in fact, exist, these comments in the FEISS expose them. That is what worst case analysis under 40 C.F.R. § 2503.33 requires. The Corps has complied with that requirement.

F. New Supplemental EIS

ONRC's final argument is that the Corp violated NEPA by failing to prepare a new supplemental EIS in light of new information acquired since the 1980 FEISS was prepared.

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[13] The 1974 Water Quality and Turbidity Study, A.R. 4, vol. 1 at 34 describes how the turbidity measurement is calculated. The Corps used the WESTEX mathematical modelling technique to predict future turbidity potential. *See* A.R. 6, App. C, § 10 for explanation of mathematical modelling. To verify the accuracy of the WESTEX model the Corps studied actual turbidity data from Lost Creek Dam with predicted data from WESTEX. This study resulted in the 1979 Water Quality Update, A.R. 6, App. C.

"[A] federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions even after the release of its EIS." *Enos v. Marsh,* 769 F.2d at 1373; *Stop H-3 Association v. Dole,* 740 F.2d 1442, 1463 (9th Cir. 1974[)], *cert. denied* ____ U.S. ____, 105 S.Ct. 2344 (1985). The agency must supplement its EIS if "(t)here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts. 40 C.F.R. § 1502.9(c)(1)(i) and (ii) (1984). An agency's decision not to supplement an EIS in light of new information will be upheld if it is reasonable." *Id., Stop H-3 Association,* 740 F.2d at 1463; *Warm Springs Dam Task Force,* 621 F.2d at 1024.

The new information ONRC asserts justifies a new EIS supplement consists of two studies: Oregon Fish and Wildlife Department an "OFWD" study indicating concerns that the project will reduce fish population and angling opportunities;[14] and a soil survey done by the U.S. Soil Conservation Service.[15]

The Corps has evaluated the draft OFWD study and memorandum by several OFWD biologists regarding this study and has concluded that it did not present new information significant enough to justify a new EIS supple-

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[14] Phase I Completion Report, Lost Creek Evaluation (Draft), dated August 3, 1984, A.R. 88, and Final Phase I Report, dated August, 1985, A.R. 92, completed by ODFW under contract with the Corps. The final report is currently under review by the Corps and outside experts. ONRC's actual reliance in arguing that the Corps must supplement its FEISS is on memoranda of several OFWD biologists who base their concerns on the Phase I Report findings. Exhibit 14 to Plaintiff's Brief Supporting Preliminary Injunction.

[15] Plaintiff's hearing exhibits 1-8 include the Soil Survey results and accompanying maps submitted to the Corps on August 13, 1982.

ment.[16] The Corps is continuing to study the concerns expressed in the final OFWD study and to date has determined that no significant new information has been discovered justifying a new EISS.[17]

The study conducted by the U.S. Soil Conservation Service and submitted to the Corps in 1982 was discussed at length during the preliminary injunction hearing. The Corps' erosion control and sediment specialist who received this survey testified he did not consider it in a reevaluation of the environmental consequences of the dam. He testified that, while the soil mapping information

[16] *See* December 13, 1985 Affidavit of Jeffrey C. Laufle, Corps fishery biologists responsible for managing thc ODFW Rogue River Fishery Evaluation Studies. *See also* reference to December 9, 1985 deposition of Steven Cramer cited to in Defendant's Memorandum in Support of Summary Judgment and in Opposition to Plaintiff's Application for Injunctive Relief, pgs. 39-41.

[17] The final Phase I completion report has been under review since it was submitted to the Corps in August, 1985. The evaluation has been conducted by Jeffrey Laufle, Corps fishery biologist and outside experts. *See* Jeffry Laugle Affidavit, supra n.36.

In November, 1985 at the request of the Corps' Portland District Office, the Corps' Waterways Experiment Station performed temperature modelling for the Rogue River with the proposed Elk Creek Dam in place. This study concluded that "Elk Creek Dam will have a minor influence on temperature in the Rogue River. This is due to the small portion of Rogue River flow contributed by Elk Creek. In most cases, the results indicate that Rogue River temperatures with Elk Creek Dam should be about the same or slightly cooler. The only periods that showed a discernable increase in Rogue River temperatures with Elk Creek Dam were parts of July and August, 1979." Affidavit of Mark S. Dortch, December 12, 1985. This indicates that the Corps is continuing its obligation to evaluate the environmental consequences and to determine whether new information, such as that submitted by USFW, justifies supplementation of its FEISS.

is helpful in looking at the management of the project, as a scientific document evaluating turbidity production it is not very helpful.[18] He concluded that this survey did not produce significant new information justifying a new EIS supplement.

The Corps has concluded that no significant new information has been discovered which requires supplementation of its FEISS. Based on the information contained in the two studies at issue, and the Corps' review of them, I agree that the Corps' conclusion not to supplement its FEISS was reasonable.

[18] Plaintiff's Hearing Exhibits 1-8. The survey documents and illustrates the composition of soils near the Elk Creek shoreline. It does not specifically indentify soils with high turbidity potential, nor was it designed to evaluate turbidity potential.

Roger Borine, Area Soil Scientist for the USGS testified that with the use of a hydrometer it is possible to determine the content of particles in water to evaluate the density of water, i.e. the suspended solids in water. He testified that this measurement is the functional equivalent of turbidity. Based on his soil studies he concluded the 83% of the shoreline would have high sediment producing potential and, correspondingly, 83% would have high turbidity producing potential. These percentages are significantly higher than the FEISS indicates.

Borine acknowledged, however, that he is not an expert in measuring turbidity nor has he conducted tests on soils to determine turbidity potential. He further testified that he had no knowledge of what kind of soil testing the Corps had undertaken.

When asked the probable turbidity effect if the Corps began construction and soils are disturbed, Borine stated that the answer depends on whether there is proper management and proper cover of the area. This conclusion is consistent with the Corps' erosion control and sediment specialist's conclusion that the mapping survey is a helpful tool in managing the project but is not scientific document regarding the turbidity potential.

III. CONCLUSION (NEPA):

None of the ONRC's alleged NEPA violations in the Corps' FEISS is substantiated. The Corps took a hard look at the environmental consequences of the project and Congress has the full benefit of that hard look when it directed that the Corps proceed with construction.

Congress' substantive decision is not subject to judicial review. As the 5th Circuit concluded in *Sand,*

> Congress was very aware of the environmental problems which surrounded the project but chose to approve it (over the President's contrary recommendation) in spite of these problems. Congress became the ultimate decision-maker. Such as legislative decision effectively supplants the Corps' decision to build the project and precludes our review of that substantive decision.

Sand, 629 F.2d at 1013, *citing Environmental Defense Fund, Inc., v. Corps of Engineers,* 492 F.2d 1123 (5th Cir. 1984).

ONRC has not established its entitlement to a preliminary injunction. It fails both tests set out in *City of Tenakee Springs;* it has not established a likelihood, or even a serious question, that the Corps violated NEPA requirements in preparing its FEISS. Therefore, ONRC's motion for preliminary injunction is denied.

IV. CONSOLIDATION OF HEARING AND TRIAL ON MERITS

This opinion, thus far, is of course one in which the test being applied is that of an application for a preliminary injunction. I recognize that the test is different when the issue is presented to the court on the merits. During the latter stages of the drafting of this opinion, ONRC filed a motion to consolidate the preliminary injunction hearing with the trial on the merits on the NEPA claim.

FRCP 65(a) gives me the discretion to treat a hearing for preliminary injunction as a final adjudication on the merits so long as the procedure does not result in prejudice to either ONRC or the Corps of Engineers. *Glacier Park Foundation v. Watt,* 663 F.2d 882, 886 (9th Cir. 1981). Because the merits of the NEPA claim were reached at the preliminary injunction hearing, I exercise my discretion and grant ONRC's motion to consolidate the hearing and the trial.

For the reasons set forth above, I also deny on the merits plaintiffs' request for a permanent injunction on the NEPA claim. Thus, it becomes unnecessary for me to rule on the Corps's motion for summary judgment. If I were to address the Corps' motion, however, I would undoubtedly grant that motion for the reasons explained above.

Because I find that there is no just reason for delay, I expressly direct the clerk to enter a final judgment against ONRC on the NEPA claim, pursuant to FRPC 54(b). I further direct the clerk to enter an order dismissing ONRC's WASRA claim, without prejudice, pursuant to FRPC 41(a)(2).

IT IS SO ORDERED.

DATED this 28 day of February 1986.

/s/ JAMES M. BURNS
James M. Burns
United States District Judge

APPENDIX C

[Seal] DEPARTMENT OF THE ARMY
PORTLAND DISTRICT CORPS OF ENGINEERS
P.O. BOX 2946
PORTLAND, OREGON 97208

NPPEN-PL-NR 1 March 1982

To All Interested Parties:

Inclosed for your information is a copy of the Record of Decision (ROD) for the proposed Elk Creek Lake project. The ROD has been prepared pursuant to the 1978 Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act (40 CFR 1505.2).

Copies of the ROD are being provided to concerned agencies, organizations, and members of the public known to have an interest in the project.

Sincerely,

/s/ Terence J. Connell
TERENCE J. CONNELL
Colonel, Corps of Engineers
District Engineer

RECORD OF DECISION
ELK CREEK LAKE
ROGUE RIVER BASIN, OREGON

Pursuant to Council on Environmental Quality Regulation, 40 CFR 1505.2 and Corps of Engineers Regulation 33 CFR 230, the following is a concise statement, for the public record, of the U.S. Army Corps of Engineers' decision in regards to the Elk Creek Land project in Jackson County, Oregon.

The decision is to proceed with construction of the Elk Creek Lake project subject to the approval of funds by the United States Congress.

Backgound: Elk Creek Lake is a part of the Rogue River Basin project, which includes three multiple-purpose dams designed to operate as a system to relieve flooding in the Rogue River Basin and to accomplish additional authorized project purposes of water supply, irrigation, fish and wildlife enhancement, hydropower, and recreation. Planning for this project began in the 1930's in response to recurring flood problems in the basin. A water resources development plan was submitted to Congress in 1962 (PL 87-874). The system, as approved, included three dams: Lost Creek Dam on the Rogue River, Applegate Dam on the Applegate River, and Elk Creek Dam on Elk Creek near its confluence with the Rogue. Lost Creek Dam was completed in 1977, and Applegate Dam in 1981.

Elk Creek Lake would include a 238-foot-high rock fill dam, which would impound 101,000 acre-feet of water at full pool. The project is designed to provide flood control through regulation of runoff from about 98 percent (132 square miles) of the Elk Creek watershed. Detailed planning and design for Elk Creek Lake has been completed, and construction began in 1971 with the acquisition of

project lands, relocation of residents, and relocation of some roads and utilities.

A Final EIS filed with the Council on Environmental Quality (CEQ) in September 1971. In that final statement, it was acknowledged that further studies into the turbidity potential of the proposed reservoir project were required. Those studies were performed and discussed in a Draft EIS Supplement released in June 1975. However, controversy at that time over both the impacts and benefits of the project resulted in withdrawal of support for the project by the Oregon Water Policy Review Board and the subsequent request by the Governor of Oregon that the Corps of Engineers suspend further work until the effects of the Lost Creek Lake project on water quality in the Rogue River could be observed. As a result, construction was stopped and the 1975 Draft EIS Supplement was not finalized, pending additional study.

The original water quality studies were addressed in the 1974 Rogue River Basin Temperature and Turbidity Study, prepared by the Corps of Engineers and coordinated with other Federal and State water resource agencies. The update of that study was completed in May 1979, following completion of additional water quality studies utilizing data obtained from observation of Lost Creek Lake operation. The purpose of these studies was to verify the mathematical model used to predict temperature and turbidity conditions in Elk Creek Lake.

This updated information relating to water quality as well as other environmental impacts of the proposed Elk Creek Dam was addressed in the Final Environmental Impact Statement Supplement completed and filed in December of 1980.

Alternatives Considered:

a. Preauthorization Alternatives: During preauthorization planning, completed in 1962, the Corps of Engineers studied the water resources and needs of the Rogue River Basin. That study, coordinated through local, State, and Federal interests and agencies, as well as local groups and individuals, specifically considered the benefits of four basic types of flood control alternatives against the alternative of taking no action. They were: (1) flood plain evacuation; (2) land-use regulations; (3) levees and local works; and (4) reservoirs. Alternatives for other project functions were also developed to measure benefits and to insure that the project were properly scoped.

Reservoirs were chosen over non-reservoir alternatives for the Rogue Basin project in 1961 because reservoirs were found to be the most effective solution to the winter flood damage and summer water shortage problems of the Rogue Basin, and because other alternatives were either not economically feasible or were ineffective. The three proposed reservoirs were chosen instead of multiple, smaller upstream dams because the proposed reservoirs would be larger, control more watershed area, and as a result, be more effective for flood control and conservation uses. Reservoirs further downstream, although more effective for flood control, were not selected because they would have greater impacts on fishery resources than the proposed sites.

b. Post Authorization Alternatives: During the course of advance engineering and design (following Congressional authorization of the project in 1962), further, more specific alternatives were considered in regard to precise reservoir sites and sizes and structural design. The resulting design was chosen because it provided the

greatest benefits in return for the amount of investment with project purposes being adequately served at minimum costs.

Due to the advanced stage of project planning and design at the time the National Environmental Policy Act was passed in 1969, the only practical alternatives remaining to be considered in the EIS process were: (1) the completion of the project as authorized and designed or, (2) the "no-action" alternative of not constructing the project. Considering the environmental impacts associated with these two principal alternatives, the "no-action" alternative is found to be the environmentally preferable alternative. The "no-action" alternative would avoid the inundation of 1,290 acres of wildlife habitat, farm and forest lands, the blockage of anadromous fish passage, and the reduction in the amount of available spawning habitat as well as other adverse impacts identified in the EIS.

While environmentally preferable, the "no-action" alternative would not allow for maximization of the three-reservoir system benefits, efficiency of the system would be significantly reduced, and the accomplishment of the system's purposes would not be realized.

Mitigation:

a. Fish: The Cole M. Rivers Fish Hatchery was constructed at Lost Creek Lake to mitigate the loss of anadromous fish-spawning habitat as a result of the three-dam Rogue Basin project. The hatchery is operated by the Oregon Department of Fish and Wildlife with Federal and State funds, and is designed with sufficient capacity to compensate for fishery losses caused by all three Rogue River Basin project dams.

b. Wildlife: Measures to compensate for loss of wildlife habitat resulting from reservoir construction will be developed in coordination with the Oregon Department of Fish and Wildlife and the U.S. Fish and Wildlife Service. The compensation will be most likely accomplished by managing selected lands to increase the quality of habitat and therefore its carrying capacity for wildlife. The management will most likely consist of a number of habitat manipulative techniques in conjunction with other land uses, landscaping at the project, and development of recreation sites.

Section 404 of the Clean Water Act: As evaluation has been made of the effects of the discharge of fill materials into the waters of Elk Creek as a result of contruction of the project. It was determined that the proposed fill would not cause unacceptable disruption to the beneficial water quality of the affected ecosystem. Appropriate measures have been identified and incorporated into the proposed plan to minimize adverse effects on the environment as a result of fill activities.

A Section 404(b)(1) evaluation was included in the EIS Supplement, and under the provision of Section 404(r), will be submitted to Congress prior to the actual discharge of fill material or the further appropriation of funds for construction. Completion of this procedure will constitute compliance with Section 404 of the Clean Water Act.

In summary, I find no reason for further delay of construction of Elk Creek Lake and completion of the Rogue River Basin project. The environmental effects of the project have been identified and throughly discussed through the process of coordination and review of the Environmental Impact Statement Supplement. All practicable means have been incorporated into the project

plans to avoid or minimize environmental harm and to mitigate for loss of fish and wildlife habitat. The benefits to be realized through construction of Elk Creek Lake outweigh the economic and environmental costs, and completion of this project represents the course of action which, on balance, serves the overall public interest.

/s/ James W. Van Loben Sels

Date: 19 Feb 82

JAMES W. VAN LOBEN SELS
Brigadier General, CE
Division Engineer

APPENDIX D

[Seal] DEPARTMENT OF THE ARMY
PORTLAND DISTRICT CORPS OF ENGINEERS
P.O. BOX 2946
PORTLAND, OREGON 97208

Planning Division (PL-NR-EQ) Jan. 10, 1986

Director
Office of Federal Activities (A-104)
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Sir:

Enclosed for filing is the Supplemental Information Report (SIR) No. 2 for Elk Creek Lake, Rogue River Basin, Oregon. This SIR has been prepared in accordance with the National Environmental Policy Act. Copies of the report are also being circulated for information to concerned agencies and the interested public who provided comments on the draft and/or final Environmental Impact Statement.

I am providing a copy of this letter to the Regional Administrator, Region X.

Sincerely,

/s/ Gary R. Lord

GARY R. LORD
Colonel, Corps of Engineers
District Engineer

Enclosure

Copy Furnished:

Regional Administrator
EPA, Region X

SUPPLEMENTAL INFORMATION REPORT NO. 2
ELK CREEK LAKE
ROGUE RIVER BASIN, OREGON

Introduction

The Elk Creek Lake project is located in Jackson County, Oregon, on Elk Creek 1.7 miles above its confluence with the Rogue River. The environmental effects of this project have been addressed in the following documents which are incorporated herein by reference.

1) A Final Environmental Impact Statement (EIS), filed with the Council on Environmental Quality on 17 September 1971;

2) A Final EIS Supplement (EISS) filed with the Environmental Protection Agency on 24 December 1980;

3) A Record of Decision signed by the North Pacific Division Engineer, 19 February 1982;

4) An Environmental Assessment (EA) and Findings of No Significant Impact (FONSI), addressing project design changes, signed by the Portland District Engineer on 11 October 1983; and

5) A Clean Water Act Section 404 Evaluation signed by the Portland District Engineer 11 October 1983.

Recent claims by the Oregon Natural Resources Council (ONRC) and others have stated that the Corps should prepare another Supplemental EIS because there is "significant new information" relevant to environmental concerns and bearing on the Elk Creek Lake Project. While it is clear based upon our review that this information does not require additional NEPA documentation, Corps regulations provide that a Supplemental Information Report can be used to disseminate information on points of concern regarding environmental impacts set forth in the EIS. The purpose of this report is to provide

supplementary information on points of concern raised by public and private organizations since completion of the Final EIS Supplement.

Wildlife

One concern is that wildlife impacts associated with Elk Creek were not adequately addressed in the EIS Supplement because the irrigation project with its associated wildlife benefits may not proceed and a wildlife mitigation plan has not been developed.

Both of these issues were addressed in the Final Environmental Impact Statement Supplement (EISS) for Elk Creek Lake. The EISS recognized that wildlife benefits for Elk Creek Lake were related to the irrigation project and may not be realized. The EISS stated, "For the 'Without Irrigation Diversion' category, no wildlife benefits have been assigned." The EISS also recognized the need for the development of a wildlife mitigation plan. Because a wildlife mitigation plan has not yet been developed, the EISS assumed the maximum level of adverse effects to wildlife. Implementation of a mitigation plan will lessen the extent of wildlife impacts.

Planning for wildlife mitigation at Elk Creek project is in progress, with an interdisciplinary team consisting of representatives from the Corps of Engineers, U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife, and Bureau of Land Management. Field work will be conducted in January 1986 to measure habitat variables for each of eight target species. Habitat Evaluation Procedures (HEP) will be completed by 1 February 1986, with the Wildlife Mitigation Plan completed in April 1986. The Corps has budgeted $350,000 for this Wildlife Mitigation Plan which will be implemented, subject to the availability of construction funds, in February 1987.

Fisheries

The Corps of Engineers entered into contract with Oregon Department of Fish and Wildlife in 1974 to evaluate the effect of the Rogue River Basin projects on anadromous fisheries resources—The Rogue Fisheries Evaluation Program. The studies have continued to the present time with approximately four million dollars expended to date. As reported to Congress, the purpose of these investigations is to determine the effect of the Rogue projects on fisheries resource and to determine the mechanisms influencing fish production. This information is necessary to "fine tune" the Rogue River basin projects to maximize fisheries enhancement benefits consistent with other project purposes. To date, Applegate and Lost Creek projects are being evaluated, and the Corps is now reviewing a proposal from ODFW for pre-impoundment studies related to Elk Creek as part of the Rogue River Basin Fisheries Evaluation Program.

Fisheries-related concerns expressed by ONRC and others are based upon information contained in a report under the above-referenced contract, the Lost Creek Phase I Report dated August 1985, and an internal ODFW memorandum dated 21 February 1985. The report is the result of studies done in pre- and post impoundment years 1974-81 on the effects of Lost Creek Dam on downstream anadromous fish and angling in the Rogue River. It is currently under review by the Corps and outside consultants. The memorandum, by ODFW staff biologists, discusses specific concerns regarding possible effects of Elk Creek Dam. (It should be noted that this memorandum does not represent the official position of ODFW or the State of Oregon on the Elk Creek Lake Project.)

The concerns expressed by ONRC and others relate to several elements in a complex array of factors affecting Rogue River anadromous fisheries as follows:

1) A fall or winter warming of the river by heat stored in a reservoir may cause early emergence of spring chinook fry from the gravel. This could expose the fry to a wintertime lack of food and the possibility of being swept out of optimal rearing habitat. The mathematical modelling in the Lost Creek Phase I Report predicts a decreased survival of 60-80 percent of a 1° C rise in mean maximum January river temperatures. However, this effect has been subsequently recalculated by ODFW to 30-45 percent for the same temperature increase. These estimates do not take into account the beneficial effect provided by the dams of reducing peak floodflows during egg incubation and fry rearing, even though this beneficial effect was recognized in the Phase I Report. The reduction in peak floodflows can partially or fully offset the negative effects of temperature increases on fry survival. Further, the model has yet to be validated, so that while the biological reasoning is sound and has been recognized for some time, the predictive capability of the model is uncertain. Comments generated by internal Corps review, outside consultants, and ODFW indicate that the model and its conclusions can not yet be treated with reliability.

The Corps' Waterways Experiment Station in Vicksburg, Mississippi, has modelled downstream temperatures as a result of Elk Creek Dam, using 1978-79 as validation years. In most cases, the results indicate that Rogue River temperatures with Elk Creek Dam should be about the same or slightly cooler. The only periods that showed a discernible increase were parts of July, August, and December 1979 which showed a maximum temperature in-

crease of about 0.6° C. The effects of this temperature increase on spring chinook fry will be offset by the reduction in peak winter flows and further mitigated by the ability of the intake tower to regulate outflow temperatures. This latter point is supported in an experiment conducted by ODFW in conjunction with the Corps. In 1984 the Corps operated Lost Creek Dam to reduce outflow temperatures from the dam. The results of this experiment were summarized in an August 1985 letter from ODFW. That letter stated, "The experimental reduction in outflow temperatures last October and November, in conjunction with other factors, appears to have improved survival to the fry stage. We had the lowest number on record of wild fish spawning, yet this spring we had the second highest abundance of spring chinook fry on record." These findings support the summary in the EISS on the effects of the Elk Creek project on Rogue River temperatures and the conclusion that the operation of the multilevel intake tower would minimize adverse effects on the fish resources.

2) Unusual prespawning mortality of fall chinook after impoundment of Lost Creek Lake has been thought to be the result of certain disease organisms found in dead and dying fish. ODFW biologists are concerned that Lost Creek Dam may be related to these outbreaks. A study was performed with Corps funding that investigated these epizootics. The organisms were not detected in Lost Creek Lake outflow; there were no similar high outbreaks of prespawning mortality in the Applegate River following closure of Applegate Dam; and there had been occurrences of spring chinook prespawning mortality in the Rogue prior to closure of Lost Creek Dam. The fact that the fall chinook mortalities occurred after Lost Creek impoundment is not firm enough evidence to implicate Elk Creek Lake as a potential harbor of disease organisms. If

anything, the dams can control what might be greater prespawning mortality since lower flows and higher temperatures in summer are believed to aggravate the disease problem and Lost Creek provided higher flows and lower temperatures during that period. Elk Creek has the potential to provide the same benefits.

3) Flow augmentation from drawdown operations of Lost Creek Lake has approximately doubled natural Rogue River flows in the late summer and early fall. This has prompted some complaints from anglers and guides of reduced ability to fish. Rogue River fisheries studies on this question are inconclusive. Based upon a typical release schedule, Elk Creek would increase water surface elevations at Agness by approximately 2-1/2 inches during the same period. Unavoidable adverse effects to fishing during these periods were recognized in the EISS because of dam operations, although not specifically identified to increased flow.

Another concern attributed to flow augmentation is the potential for dewatering of spring chinook salmon spawning redds. This would result from salmon spawning on gravel bars early in the fall which are later dewatered when drawdown operations are complete. However, ODFW has stated that they have not identified any significant mortality due to dewatered redds which they have observed. Such dewatering would be temporary due to flow fluctuations. There are also mitigating factors such as cool temperatures, rain, and subgravel flow which aid survival of eggs and preemergent fry. In addition, redd dewatering can be minimized through control of dam outflows.

4) Another concern relates to the size of spring chinook runs after Lost Creek Dam closure in 1977. With two exceptions, run sizes have been within the normal range. Run sizes in 1983 and 1984 were low. These runs may have

been a result of poor ocean conditions, namely the El Nino phenomenon in which upwelling from the deep ocean ceases. The resulting scarcity of nutrients, combined with warm surface temperatures are believed to impair salmon growth and survival. The 1985 run was one of the best on record.

Turbidity

Concern has been expressed that the extensive timber clearing which has occurred in recent years on private lands in the Elk Creek watershed will increase potential sediment yields to the reservoir, causing long-term turbidity problems both in the reservoir and downstream. Turbidity is a factor in the ability of juvenile fish to feed, and the fishability of angling gear, as well as production of invertebrates which serve as food for juvenile anadromous fish. Effects of Elk Creek Lake operations on downstream turbidity were addressed in the 1980 EISS with the conclusion that there would be no significant effects on fish production.

A review of turbidity data collected by the U.S. Geological Survey between 1974 and 1985 at Elk Creek indicates the average daily turbidity levels in the 1980's are generally as low as those of the 1970's. Although there appears to have been higher turbidity values at Elk Creek during the early 1980's as a result of logging, watershed recovery appears to have occurred to reduce the turbidity levels back to those of the 1970's when primary studies were conducted.

In addition, and as discussed below, turbidity levels will to a large extent be controllable through the operational flexibility provided by the dam's multilevel intake tower. As a result, the turbidity effects are not expected to differ from those described in the 1980 EISS.

Project Flexibility

As indicated in the EIS Supplement, the project includes a multilevel intake tower which provides the capability to control flow, temperature, and turbidity. As presently designed, the Rogue Basin Projects, including the Elk Creek Project, will be operated in accordance with rule curves designed to benefit project purposes as set forth in the authorizing documents. In Design Memorandum No. 10, Supp. 2, an additional release elevation was added to insure greater flexibility in meeting temperature ranges resulting from the Rogue River Fishery Evaluation Studies. A secondary benefit would be operational flexibility to reduce turbidity levels released from the project. The Elk Creek project also has the capability to operate with little effect on temperature or flow except for storm events. Pre- and post-impoundment studies conducted to date and to be conducted will evaluate the effects of the projects. Should results from these continuing studies necessitate significant changes in project operation in order to benefit project purposes, appropriate environmental documentation would be prepared in accordance with NEPA.

/s/ Gary R. Lord

Date: 10 January 1986

GARY R. LORD
Colonel, Corps of Engineers
District Engineer

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-3670
D.C. No. Cv-85-6433

OREGON NATURAL RESOURCES COUNCIL, OREGON GUIDES AND PACKERS ASSN., INC., ROGUE FLYFISHERS, INC., AND ROGUE RIVER GUIDES ASSN., PLAINTIFFS-APPELLANTS

vs.

JOHN O. MARSH, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, AND ELVIN R. HEIBERG, III, IN HIS OFFICIAL CAPACITY AS CHIEF OF ENGINEERS OF THE UNITED STATES DEPARTMENT OF THE ARMY, DEFENDANTS-APPELLEES

Dec. 21, 1987

APPEAL from the United States District Court for the District of OREGON (Eugene).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of OREGON (Eugene) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Filed and entered November 24, 1987

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-3670
D.C. No. CV-85-6433-F

OREGON NATURAL RESOURCES COUNCIL, ET AL., APPELLANTS

v.

JOHN O. MARSH, ET AL., APPELLEES

[Filed Dec. 10, 1987]

ORDER

Before: WALLACE, FERGUSON and NORRIS, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX G

REGULATIONS INVOLVED

I.

The Council on Environmental Quality's present regulation governing incomplete or unavailable information provides in pertinent part (40 C.F.R. 1502.22):

Incomplete or unavailable information

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

* * * * *

II.

The Council on Environmental Quality's rescinded regulation governing incomplete or unavailable information (the "worst case" regulation) provided in pertinent part (40 C.F.R. 1502.22 (1985)):

Incomplete or unavailable information

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision

and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

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OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED
MAY 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1704

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

OREGON NATURAL RESOURCES COUNCIL, ET AL., RESPONDENTS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NEIL S. KAGAN
Counsel of Record
for Respondents
300 Willamette Building
534 S. W. Third Avenue
Portland, Oregon 97204
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a6p

QUESTIONS PRESENTED

Whether the Army Corps of Engineers observed the following:

1. The mandate of the National Environmental Policy Act and the regulation of the Council on Environmental Quality requiring an environmental impact statement to include discussions of means to mitigate adverse environmental impacts;
2. The mandate of the National Environmental Policy Act requiring an environmental impact statement to include a "worst case" analysis of significant adverse impacts essential to a reasoned choice among alternatives;
3. The mandate of the National Environmental Policy Act and the regulation of the Council on Environmental Quality requiring the preparation of a supplemental environmental impact statement if there is significant new information relevant to environmental concerns bearing on a proposed action or its impacts.

PARTIES TO THE PROCEEDING

Respondents accept petitioners' description of the parties to the proceeding. Each of the respondents is an Oregon non-profit, non-publicly traded corporation. None of the respondents has any parent companies, subsidiaries, or affiliates. This statement is provided pursuant to Supreme Court Rule 28.1.

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No. 87-1704

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

OREGON NATURAL RESOURCES COUNCIL, ET AL., RESPONDENTS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents, Oregon Natural Resources Council, Oregon Guides and Packers Association, Inc., Rogue Flyfishers, Inc., and Rogue River Guides Association, respectfully request that this Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

With the addition of two regulations of the Council on Environmental Quality, reproduced in pertinent part in an appendix to this brief in opposition (App., *infra*, 1-2), respondents accept petitioners' recitation of the statutory provisions and regulations involved.

STATEMENT OF THE CASE

With the following additions and corrections, respondents accept petitioners' statement of the case, as supplemented by the facts in the opinion of the Court of Appeals:

1. Although the Court of Appeals was divided on the necessity of a supplemental environmental impact statement, and on the proper scope of a worst case analysis, the court unanimously held on three individual grounds that the 1980 supplemental environmental impact statement prepared by the Army Corps of Engineers for the Elk Creek Dam violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq*. The court unanimously agreed that the supplemental environmental impact statement failed to discuss adequately means to mitigate adverse environmental impacts; failed either to conduct research or a worst case analysis of significant adverse impacts essential to a reasoned choice among alternatives; and failed to discuss adequately cumulative environmental impacts of the Elk Creek Dam and two other dams.[1]

[1] Petitioners do not seek review of the court's holdings (1) that research is required to dispel uncertainty about significant adverse environmental effects if the research is scientifically possible and not exorbitantly expensive; or (2) that the cumulative impacts of the Rogue River Basin Project must be considered.

2. The economic cost of the Elk Creek Dam (hereinafter "the project") was estimated in 1980 to exceed $105 million dollars. Elk Creek Lake, Rogue River Basin, Oregon, Environmental Impact Statement, Supplement No. 1, Dec. 1980 (hereinafter *"Elk Creek Supplemental Statement"*) 4.[2] Although planned for flood control, most of the benefits attributed to the project's flood control features have been questioned by the General Accounting Office of the United States. District Court Docket No. 29 (Administrative Record No. 12).

3. The Rogue River was one of the eight rivers in the nation given immediate recognition as a wild and scenic river in 1968, due to its outstanding fishing qualities, provided by resident populations of salmon and steelhead, many miles of near natural scenic environment, and diversity of recreational and scenic values. Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, § 3(a), 82 Stat. 906 (1968) (current version at 16 U.S.C. § 1274(a) (1982 ed.)); H.R. Rep. No. 1623, 90th Cong., 2d Sess. 1 (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3801, 3803, 3805; Conf. Rep. No. 1917, 90th Cong., 2d Sess. 1 (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3852.

4. Construction and operation of the project would create a reservoir 6.2 miles long which would cover approximately 1,290 acres of land. District Court Docket No. 29 (Administrative Record No. 1). The project would eliminate self-sustaining populations of summer and winter steelhead and coho salmon upstream of the dam; displace and probably eliminate wildlife populations dependent on the habitat to be flooded; and increase turbidity downstream in the Rogue River, depressing fish populations and fishing success, especially for fly-fishers, for steelhead and salmon during late summer, early fall, and

[2] Petitioners lodged a copy of the *Elk Creek Supplemental Statement* with the Clerk of the Court. Petition 4 n. 1.

winter. *Elk Creek Supplemental Statement* 38, 46.

5. The Corps' 1979 "verification" of the computer simulations in the 1974 Temperature and Turbidity Report was sharply criticized both by the National Marine Fisheries Service and the Oregon Department of Fish and Wildlife. *Elk Creek Supplemental Statement* 68 (Comment No. 6-7), 135-138 (Comment No.'s 32-1, 32-15, 32-16, 32-28). The National Marine Fisheries Service had concluded from the 1974 report "that the Elk Creek project would have significant adverse impact on fish production and angling in the Rogue River." *Elk Creek Supplemental Statement* 135 (Comment No. 32-3).

6. Petitioners incorrectly state that the Supplemental Information Report prepared by the Corps explained why new information provided by the Soil Conservation Service was not significant. The Supplemental Information Report dic not even address the Soil Conservation Service's information. *See* Petitioners' App. 66a.

7. In requesting a rehearing of the decision of the Court of Appeals, petitioners suggested a rehearing *en banc*, however no judge of the court requested a vote to rehear the matter *en banc*. Petitioners' App. 69a.

REASONS FOR DENYING THE PETITION

The Court of Appeals' review of the Corps' actions was entirely consistent with the purposes and mandate of NEPA, as interpreted by this Court. The court did not create new NEPA requirements, or substitute its judgment for the Corps'. Rather, the court correctly found the Corps to have violated the procedural requirements of NEPA and the regulations of the Council on Environmental Quality (hereinafter "the CEQ").

Petitioners broadly claim that the Court of Appeals deviated from the Court's precedents. Their claim is based upon a string

of quotations pieced together from the Court's decisions in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976); and *Andrus* v. *Sierra Club*, 442 U.S. 347 (1979). The principles established by those cases, however, do not prohibit judicial review of agency action for compliance with the procedures required by NEPA. To the contrary, the Court's cases demand a "hard look" at environmental consequences to ensure adequate consideration and full disclosure of environmental impacts before a proposed action proceeds; only the final, substantive decision whether to proceed is left to the agency's discretion. *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S 223, 227-228 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. at 553, 558; *Kleppe* v. *Sierra Club*, 427 U.S. at 410 n. 21.

In *Vermont Yankee*, the Court said a reviewing "court must determine whether an agency has complied with the procedures mandated by the relevant statutes. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 417 (1971)."[3] *Vermont Yankee*, 435 U.S. at 549 n. 21. Moreover, said the Court, "[a]dministrative decisions should be set aside . . . for substantial procedural . . . reasons as mandated by statute . . . ." *Id.* at 558. The Court of Appeals did no more here than follow the Court's directives.

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[3] In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), the Court found the standard of review of agency action to be prescribed by the Administrative Procedure Act, 5 U.S.C. § 706 (1982 ed.). A court first must decide whether an agency acted within the scope of its authority; then whether the agency's chosen action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (1982 ed.); and finally whether the agency observed "the procedure required by law," 5 U.S.C. § 706(2)(D) (1982 ed.). 401 U.S. at 415-417.

1. The Court of Appeals properly construed the existing duty to discuss mitigation plans.

The Court of Appeals required adequate consideration and full disclosure of the Corps' own mitigation plans or, in the court's words: a discussion "analyz[ing] the mitigation measures in detail and explain[ing] the effectiveness of the measures." Petitioners' App. 5a.

The court's holding clearly requires no more than a discussion of the extent to which adverse impacts will be mitigated under the Corps' own plans.[4] Petitioners significantly overstate the court's actual holding on mitigation by implying it imposed a substantive duty of mitigation, requiring an environmental impact statement to contain, in petitioners' words: "demonstrably effective mitigation plans." Petition 9. The Corps, not the court, proposed to mitigate the adverse impacts of the project on wildlife by managing land to increase available wildlife habitat. *Elk Creek Supplemental Statement* 6. The Corps then relied on those mitigation plans to discount the environmental costs of proceeding with the project.[5] The court merely held that the Corps' proposed mitigation had to be discussed meaningfully.

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[4] If the court was under the impression that NEPA requires *some* mitigation, that impression was fostered by petitioners, who directed the court's attention to the passage from *Friends of Endangered Species* v. *Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985), to which the court referred in its opinion. Petitioners' App. 5a. But the court's reference to *Jantzen* was mere dictum at most. The Solicitor General's objection to a substantive duty to mitigate is more properly raised in his petition for a writ of certiorari to review *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *petition for cert. filed sub nom. Robertson* v. *Methow Valley Citizens Council*, No. 87-1703.

[5] In the Record of Decision, prepared pursuant to CEQ regulations, 40 C.F.R. § 1505.2, the Corps decided to proceed with the project because the benefits were deemed to outweigh the economic and environmental costs. Petitioners' App. 58a. That conclusion was based on the understanding that the project incorporated measures to mitigate for loss of wildlife habitat. *Id.* It is evident from the Record of Decision itself, however, that the Corps had yet to develop or decide upon specific mitigation measures, much less analyze their effectiveness. *See id.* 57a; *Elk Creek Supplemental Statement* 6. Consequently, the Corps had no basis to conclude that the benefits of the project outweighed the costs, because the magnitude of the environmental costs was not known.

It said the decisionmaker had to be given enough information about the prospects of compensating for the loss of wildlife habitat so the actual adverse impact of the project could be considered properly.

The CEQ regulations expressly require an environmental impact statement to "include discussions of: . . . means to mitigate adverse environmental impacts . . . ." 40 C.F.R. § 1502.16(h). The court's interpretation of the meaning of this requirement is consistent with NEPA's procedural mandate—that an agency must prepare "a *detailed* statement." 42 U.S.C. § 4332(C) (emphasis added). The court's interpretation also furthers NEPA's purpose—to provide "'sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision.'" *Adler* v. *Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982); *accord*, *Kleppe* v. *Sierra Club*, 427 U.S. at 410 n. 21.

Since an environmental impact statement must provide "sufficient information" to permit consideration of a proposal's environmental consequences, the discussion of mitigation mandated by NEPA and the CEQ regulations must be more than a mere listing of desired objectives. An agency may not substitute vague promises for the detailed discussion required by NEPA. *See Silva* v. *Lynn*, 482 F.2d 1282, 1284-1285 (1st Cir. 1973). The discussion must examine mitigation measures

critically, and must explain whether and to what extent specific measures will temper the effects of the action proposed by the agency. Without such a discussion, the consequences of the proposal cannot be known in advance, as they must be under NEPA. An agency may not "act now and deal with the environmental consequences later." *Foundation for North Am. Wild Sheep* v. *U. S., Etc.*, 681 F.2d 1172, 1181 (9th Cir. 1982).

Petitioners nevertheless press for the latitude to shoot first, and ask questions later. Petition 13-14. Petitioners miss the whole point of the court's decision, and apparently, of NEPA. Both require and encourage environmental analysis *before* the commitment of resources. In enacting NEPA, Congress "required . . . that the agency take a 'hard look' at the environmental consequences *before* taking a major action." *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. at 97 (emphasis added).

In this case, the Corps conceded the potential reduction in populations of mountain lion, black bear, gray fox, bobcat, mink, river otter, beaver, osprey, owls, eagles, and many other wildlife species. *Elk Creek Supplemental Statement* 26-27, 38. The Corps then claimed mitigation measures would moderate those reductions. The court's decision merely requires the Corps to analyze the effectiveness of specific mitigation measures so both the decisionmaker and the public will understand the actual consequences of the project before the Corps proceeds with it.

Petitioners assert that the court's decision will force agencies "to defer environmental analysis and to invest resources on a large scale before making even preliminary decisions." Petition 14. The decision to proceed with the construction and operation of the multimillion dollar Elk Creek Dam hardly can be considered a "preliminary decision," however. It is instead a major federal action which will significantly alter the environment of an important tributary of the renowned Rogue River, if not the Rogue itself.

2. The Court of Appeals followed well-settled law in requiring a worst case analysis.

The "worst case" analysis ordered by the Court of Appeals is an accepted NEPA requirement. Other courts have long found the concept to be a fundamental part of NEPA by interpreting the very structure and purpose of the statute. In *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079, 1082 (D.C. Cir. 1973), the court found reasonable forecasting and speculation to be implicit in NEPA. In *Carolina Environmental Study Group* v. *United States*, 510 F.2d 796, 799 (D.C. Cir. 1975), the court held that an environmental impact statement must consider the probabilities of the occurrence of environmental effects in evaluating their impact. In *Alaska* v. *Andrus*, 580 F.2d 465, 473 (D.C. Cir.), *vacated in non-pertinent part sub nom. Western Oil & Gas Association* v. *Alaska*, 439 U.S. 922 (1978), the court explained that "[o]ne of the costs that must be weighed by decisionmakers is the cost of uncertainty—*i.e.*, the costs of proceeding without more and better information."[6]

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[6] These NEPA requirements were not deemed to prevent actions proposed by federal agencies, however.

> Where th[e] cost [of uncertainty] *has* been considered, and where the responsible decisionmaker has decided that it is outweighed by the benefits of proceeding with the project without further delay, the courts may not substitute their judgment for that of the decisionmaker and insist that the project be delayed while more information is sought.

Alaska v. *Andrus*, 580 F.2d 465, 473-474 (D.C. Cir.), *vacated in non-pertinent part sub nom. Western Oil & Gas Association* v. *Alaska*, 439 U.S. 922 (1978) (emphasis in original).

The Court of Appeals for the Fifth Circuit reviewed this historical development of the worst case analysis requirement in *Sierra Club* v. *Sigler*, 695 F.2d 957, 970-971 (5th Cir. 1983).[7] The Fifth Circuit then expressly found the original CEQ regulation to be a "codifi[cation of] these judicially created principles," *id.* at 971, not, as petitioners claim, merely one possible mechanism for implementing those principles. The Ninth Circuit in this case therefore was in accord with the Fifth Circuit in concluding that the original regulation was "a codification of prior NEPA case law." Petitioners' App. 14a n. 8.

In *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. at 100, this Court "agree[d] . . . that an agency must allow all significant environmental risks to be factored into the decision whether to undertake a proposed action." In that case, the Nuclear Regulatory Commission had adopted a rule incorporating an assumption that the permanent

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[7] The Court of Appeals for the Fifth Circuit found "some language in NEPA which may be said to endorse generally the concept of a worst case analysis. *See* 42 U.S.C. § 4331(b)(3) (responsibility of federal government to avoid 'unintended' consequences of environmental use), [42 U.S.C. §] 4332(C) (EIS to disclose all environmental impacts)." *Sierra Club* v. *Sigler*, 695 F.2d 957, 969 (5th Cir. 1983). The court also noted the existence of support for a worst case analysis in NEPA's legislative history. *Id.* at 970 n. 9. The court justified judicial interpretations requiring a worst case analysis by recalling Justice Marshall's observation in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part and dissenting in part):

> [NEPA is a] vaguely worded statute seem[ingly] designed to serve as no more than a catalyst for development of a 'common law' of NEPA . . . . [C]ourts have responded in just that manner and have created such a 'common law.' (Citation omitted.) . . . Of course, the Court is correct that the courts may not depart from NEPA's language. They must, however, give meaning to that language if there is to be anything in NEPA to enforce at all.

See Sierra Club v. *Sigler*, 695 F.2d at 965, 969.

storage of certain nuclear wastes would have no significant environmental impact. The Court upheld this "zero-release" assumption, finding that the agency complied with NEPA's consideration and disclosure requirements by acknowledging that there was uncertainty about the feasibility of safely storing nuclear waste permanently, identifying the worst case ("that water might enter the respository, dissolve the radioactive materials, and transport them to the biosphere"), and weighing the likelihood that the worst case might occur. *Id.* at 94, 98-100. In other words, the agency complied with NEPA by conducting a worst case analysis.

The Court of Appeals correctly held that "the rules embodied in the [worst case analysis] regulation remain in effect even though the regulation was rescinded." *Id.* The court's adherence to the judicial interpretations of NEPA which require a worst case analysis did not mark a departure from the Court's precedents.

The CEQ regulations are merely interpretive rules, not legislative rules. Congress did not give the CEQ the authority to adopt regulations binding on federal agencies, the President did. Exec. Order No. 11991, 3 C.F.R. 124 (1978). So although the CEQ's interpretation of NEPA may be entitled to substantial deference, *Andrus* v. *Sierra Club*, 442 U.S. at 358,[8] the CEQ's interpretation is not controlling.

Further, the CEQ's interpretation of NEPA may not diminish the statute's fundamental requirements, as interpreted by the courts. Thus, the current version of 40 C.F.R. § 1502.22, like

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[8] Whatever was said in *Andrus* v. *Sierra Club*, 442 U.S. 347 (1979), about the deference due the CEQ, the Court did not resolve the issue in controversy by deferring to the CEQ's interpretation of NEPA. Rather, the Court conducted an independent analysis of the issue and made its own, reasoned interpretation, which happened to agree with the CEQ's. *Id.* at 358-361.

the original rule, is proper insofar as it requires federal agencies to "evaluate the reasonably foreseeable significant adverse impacts of an action . . . in the face of unavailable or incomplete information," including "impacts which have catastrophic consequences, even if their probability of occurrence is low . . . ." 40 C.F.R. § 1502.22(b). But the current rule's omission of the additional NEPA requirements—that agencies consider the likelihood of the worst case, and weigh the cost of proceeding without more and better information—cannot be read by petitioners to relieve agencies from compliance with those requirements. The CEQ was not delegated the power to overturn prior judicial interpretations of NEPA's requirements by amending or repealing the provisions that incorporate those interpretations.

Reviewing courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *Bureau of Alcohol, Tobacco, and Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983) (citation omitted). The court followed that rule in this case by rejecting petitioners' argument that the CEQ's current rule reduces the duties imposed on federal agencies by NEPA.

3. Preparation of a supplemental environmental impact statement was a "procedure required by law."

The Court of Appeals did not substitute its judgment for the Corps' in ordering the preparation of a supplemental environmental impact statement. Rather, relying on the Corps' own experts and premises, the court properly found that significant new information triggered an established procedural obligation to prepare a supplemental statement. (The proper resolution of this issue requires an exhaustive review of the facts, as is evident both from the opinions of the Court of Appeals and the

dissent. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see *Texas* v. *Mead*, 465 U.S. 1041 (1984) (Stevens, J.).)

An agency must prepare a supplemental environmental impact statement "if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii).[9] According to this language, the analysis ends and a supplement must be prepared once the significance of new information is established.[10] The court thus examined the evidence to ascertain whether new information provided by the Oregon Department of Fish and Wildlife (hereinafter *"ODFW Report"*)and the United States Soil Conservation Service (hereinafter *"SCS Report"*) rose to the necessary level of "significance."[11] Petitioners' App. 7a-8a. The court concluded that it did.

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[9] Petitioners do not challenge this legal standard, only its application in this case.

[10] 40 C.F.R. § 1502.9(c)(1)(ii) thus contemplates analysis of significant new information in a formal supplemental environmental impact statement so as to ensure that agencies through observance of NEPA's procedures reasonably consider and inform the public about the new information before proceeding with a proposed action. The NEPA procedures include involving the public in the process, 40 C.F.R. § 1506.6; preparing a draft environmental impact statement, 40 C.F.R. § 1502.9(a); inviting comments on the draft before preparing a final environmental impact statement, 40 C.F.R. § 1503.1; responding to comments, 40 C.F.R. § 1503.4; and making a decision on a proposed action only after the expiration of minimum time periods, 40 C.F.R. § 1506.10. None of these procedures was followed in this case.

[11] The dissent also examined the evidence in the record to evaluate whether the Corps reasonably decided not to prepare a supplemental environmental impact statement. Petitioners' App. 22a.

a. The ODFW Report

The court first reviewed the *ODFW Report*, which had "concluded that the project could result in decreased survivability of chinook salmon, higher turbidity, increased disease potential in fish, and decreased prospects for lure- and fly-fishing." Petitioners' App. 9a. The court found that the evidence from the Department's study was environmentally significant.[12] *Id.* 11a. The court further concluded that, at the very least, some of the new information was probably accurate.[13] *Id.* The court did not base this conclusion on any scientific expertise of its own, *but on the opinions of the Corps' own experts. Id.* Those experts, although critical of parts of the *ODFW Report*, "also agreed with significant portions of the study." Petitioners' App. 11a.

In addition to evaluating the significance and probable accuracy of the new information, the court evaluated the degree of care the Corps used in considering the new information, and the adequacy of the Corps' explanation of the decision not to supplement. Petitioners protest that the Corps satisfied these two factors, but the court held otherwise.

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[12] Even in the dissent there was agreement that the evidence, if accurate, would have been significant. Petitioners' App. 25a. The dissent's belief that none of the evidence *was* accurate was contrary to the opinions of the Corps' own experts. *Id.* 11a.

[13] The probable accuracy of new information is one of four factors regularly considered by the Court of Appeals in reviewing agency decisions not to supplement an existing EIS. *See Enos* v. *Marsh*, 769 F.2d 1363, 1373-1374 (9th Cir. 1985); *Stop H-3 Ass'n* v. *Dole*, 740 F.2d 1442, 1463-1465 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985); *Warm Springs Dam Task Force* v. *Gribble*, 621 F.2d 1017, 1025-1026 (9th Cir. 1980). The other factors are the environmental significance of the new information, the degree of care used in considering the information and evaluating its impact, and the degree to which a decision not to supplement is adequately explained.

Petitioners base their complaints on the Corps' Supplemental Information Report (hereinafter *"Elk Creek SIR"*), which was issued on January 10, 1986, three months after this action was brought by respondents. Petitioners claim the *Elk Creek SIR* considered and explained why the new information in the *ODFW Report* did not warrant a supplemental environmental impact statement. The consideration given the new information was only cursory, however, and the explanations of the decision not to prepare a supplement are not credible.[14]

b. The SCS Report

The court next reviewed the *SCS Report*, which contained new information proving that the Elk Creek watershed was composed of soil types far different than those shown in the *Elk Creek Supplemental Statement*. Petitioners' App. 12a, 26a. The court deemed this new information significant because the Corps itself had identified a relationship between soil type,

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[14] One example among many that could be given is the following: There was new information that fall or winter warming of the river might lead to early emergence of spring chinook, and a consequent thirty to forty percent decrease in fry survival for a one degree centigrade increase in temperature. In response, the *Elk Creek SIR* noted that "reduction of peak floodflows can partially *or* fully offset the negative effects of temperature increases on fry survival." Petitioners' App. 63a (emphasis added). This comment reveals the uncertainty even within the Corps about the possibility of compensating for decreased fry survival—uncertainty which was never disclosed in an environmental impact statement. The Corps also reported the results of an experiment conducted one year where outflow temperatures from Lost Creek Dam were regulated and spring chinook fry were very abundant. Id. 64a. But a single experiment in an environment affected by many variable conditions cannot establish the relationship attributed to the regulation of outflow temperatures and the abundance of spring chinook fry. The Corps itself criticized the Oregon Department of Fish and Wildlife for drawing conclusions about fish survivability which were based on *seven* years of data collection and study. *See id.* 62a.

erosion potential, and turbidity. *Id.* 13a. The Corps earlier had considered this relationship important enough to take it into account in analyzing the turbidity-producing potential of the watershed. *Id.* But after receiving the new information, the Corps did not consider it carefully, adequately explain why it did not warrant the preparation of a supplemental environmental impact statement, or indeed, address it in any way in the *Elk Creek SIR*.[15] *Id.* The court properly ordered the Corps to take the relationship between soil type, erosion potential, and turbidity into account again, based on the new, correct information about soil types.

The new information both in the *SCS Report* and the *ODFW Report* was highly significant, because it added new concerns, as well as new dimensions to existing concerns about the potential significant adverse impacts of the project, in terms of fish survival, fishing success, and turbidity. In view of the significance of the new information, the Corps should have prepared a supplemental environmental impact statement, and the Court of Appeals correctly so ruled.

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[15] Petitioners claim the Corps responded to a comment from the United States Forest Service which, like the United States Soil Conservation Service, questioned the accuracy of the Corps' predictions about the turbidity potential of the Elk Creek watershed. Petition 19. There are two differences between the Forest Service's comment and the new information provided by the Soil Conservation Service, however. First, and most apparent, the Soil Conservation Service actually delivered its new soil surveys to the Corps, Petitioners' App. 47a n. 15, yet received no response. Second, the Forest Service's information pertained only to its own lands, *Elk Creek Supplemental Statement* 113 (Comment No. 22-5), whereas the Soil Conservation Service's information pertained to the project lands in the Elk Creek watershed. Also, as the court's analysis demonstrates, the Corps' response to the Forest Service's comment apparently was inadequate, because the Corps did not analyze the Forest Service's information in light of the relationship between soil type, erosion potential, and turbidity.

CONCLUSION

The Court of Appeals' decision was made according to the rules laid down by this Court, and properly enjoined compliance with existing and well-established NEPA requirements which the Corps had violated.[16] Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

NEIL S. KAGAN
Counsel of Record
for Respondents

MAY 1988

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[16] Petitioners characterize the Ninth Circuit as having a "peculiar" NEPA jurisprudence, Petition 20, but fail to identify or discuss *any* conflict among the circuits.

APPENDIX

REGULATIONS INVOLVED

I.

The Council on Environmental Quality's regulation governing the discussion of environmental consequences, including the mitigatation of adverse environmental impacts, provides in pertinent part as follows (40 C.F.R. § 1502.16):

Environmental Consequences

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by secs. 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of sec. 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the

proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

* * *

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

II.

The Council on Environmental Quality's regulation governing the preparation of a supplemental environmental impact statement provides in pertinent part as follows (40 C.F.R. § 1502.9):

Draft, final, and supplemental statements

* * *

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

* * *

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

* * *

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

REPLY

BRIEF

(5)

No. 87-1704

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

OREGON NATURAL RESOURCES COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our petition for a writ of certiorari, we showed that the court of appeals has interpreted the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), to impose on federal agencies major new requirements that are not supported by the statutory language and that contradict this Court's decisions interpreting the Act. Specifically, the court of appeals has created new substantive and procedural duties with respect to mitigation, it has overridden the Council on Environmental Quality's (CEQ's) decision to discontinue the use of "worst case" analysis when addressing questions of scientific uncertainty, and it has second-guessed the district court and the agency on highly technical factual matters. Respondents' attempts to justify the court of appeals' decision and to downplay its significance are unpersuasive.

1. Respondents incorrectly contend that the court of appeals' decision "requires no more than a discussion of the extent to which adverse impacts will be mitigated under the

Corps' own plans" (Br. in Opp. 6 (footnote omitted)). The court of appeals has, in fact, expressly required far more. The court held that no environmental impact statement will satisfy NEPA unless it includes a detailed plan to mitigate the project's environmental harm. The court's opinion categorically states that an environmental impact statement "must include a discussion of measures to mitigate adverse environmental impacts of the proposed action" (Pet. App. 5a) and that "significant measures" must be "undertaken to mitigate the project's effects" (*ibid.*). "Moreover, the EIS must analyze the mitigation measures in detail and explain the effectiveness of the measures" (*ibid.*).

If there were any doubt concerning the court of appeals' holding, it was dispelled by the court's subsequent decision in *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810 (1987), petition for cert. pending, No. 87-1703. The court there forcefully reiterated and applied the pertinent language from this case to invalidate a Forest Service environmental impact statement. The court repeated its view, in words admitting no ambiguity, that NEPA requires agencies to undertake—and not merely discuss—mitigation measures, stating: "Section 4332 of NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions' " (833 F.2d at 819 (citation omitted)).[1] The court of appeals, citing the present case, further stated (*ibid.*):

> Consequently, an EIS must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action. *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051, 1055 (9th Cir. 1987). * * * "Moreover, the EIS must analyze the mitigation measures in detail and explain the effectiveness of the measures. 820 F.2d at 1055 * * *."

Finally, the court in both cases emphasized the seriousness with which it views this requirement. "The importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement." Pet. App. 7a; *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d at 820.

Thus, the court of appeals' approach to NEPA's requirements is apparent. The court commands that every environmental impact statement shall include a complete mitigation plan. It has imposed both a substantive duty to mitigate adverse environmental effects and a new, unwarranted set of procedural obligations—neither of which is rooted in any of the provisions of NEPA or its implementing regulations. This Court has repeatedly forbidden such attempts to expand NEPA's requirements. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978).[2]

[1] Respondents suggest that "[t]he Solicitor General's objection to a substantive duty to mitigate is more properly raised in his petition for a writ of certiorari to review *Methow Valley* * * *" (Br. in Opp. 6 n.4). Thus, they seem to concede that *Methow Valley*, at least, does impose a substantive duty to mitigate environmental harm.

[2] Respondents erroneously claim (Br. in Opp. 7) that the CEQ's regulations justify the court's holdings, citing the requirement that environmental impact statements "include discussions of: * * * * * [m]eans to mitigate adverse environmental impacts * * *." 40 C.F.R. 1502.16(h). That regulation does not, however, require an agency to adopt mitigation measures, it does not specify that the discussion of mitigation satisfy any particular level of detail, nor does it require, expressly or implicitly, that the agency demonstrate how proposed measures will be effective. Rather, the regulation appropriately leaves these decisions to the discretion of the drafting agency. See, *e.g.*, *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980).

Respondents also err in contending (Br. in Opp. 7) that the CEQ regulation cited above, when combined with NEPA's requirement that the agency provide a "detailed statement" (42 U.S.C. 4332(2)(C)),

Contrary to respondents' suggestions (Br. in Opp. 6 n.4, 7-8), the court of appeals' decision finds no support in lower court NEPA decisions discussing mitigation. Indeed, most of the earlier NEPA decisions involving mitigation arose in a vastly different context. Typically, an agency would conclude that a comprehensive environmental impact statement was not necessary because the agency had included, as an intrinsic element of its proposed project, a mitigation plan designed to assure that the federal action would not "significantly affect[ ] the quality of the human environment" (42 U.S.C. 4332(2)(C)). See, *e.g.*, *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985); *Foundation for North American Wild Sheep* v. *United States Dep't of Agriculture*, 681 F.2d 1172, 1180-1181 (9th Cir. 1982). We agree that where an agency relies upon a mitigation plan to obviate the need for preparation of an environmental impact statement, a reviewing court can require the agency to demonstrate that the mitigation plan is reasonably likely to be effective. But when an agency prepares an environmental impact statement, mitigation stands on a different footing. The agency has analyzed the whole range of environmental impacts associated with the project in a complete environmental impact statement

leads to the court of appeals' result. NEPA contemplates that the agency shall provide a detailed discussion of the five basic subjects, specified by the Act, that comprise an environmental impact statement. It does not require that every subsidiary matter (such as mitigation) be discussed in detail. Obviously, the agency's discussion of those five subjects can be "detailed" even if the discussion of their subsidiary components, viewed individually, contain varying levels of detail. Indeed, the CEQ regulations expressly direct agencies to limit the size of environmental documents by imposing page limits and by selecting carefully the issues that warrant extended discussion. 40 C.F.R. 1500.4. Again, the regulations leave the appropriateness of a lengthy discussion of any particular issue, including mitigation measures, to the discretion of the drafting agency.

that evaluates the environmental risks of going forward. In this context, mitigation measures can only diminish the magnitude of impacts already described, and accordingly their discussion need not be as specific or as detailed or as certain.[3]

In short, the court of appeals' institution of broad new mitigation requirements is a major departure from established NEPA law. The decision, which has far-reaching consequences for all "major Federal actions" (42 U.S.C. 4332(2)(C)) within the Ninth Circuit, plainly warrants this Court's review.

2. Respondents contend (Br. in Opp. 9-12) that the court of appeals "followed well-settled law" in requiring the agency to conduct a worst case analysis even though the CEQ had rescinded that regulatory requirement. They reason that the worst case concept is "a fundamental part of NEPA" (*id.* at 9) and that the "CEQ's interpretation of NEPA may not diminish the statute's fundamental requirements" (*id.* at 11).

[3] Thus, respondents err in contending (Br. in Opp. 8) that the government wishes to "shoot first, and ask questions later." The fact that the agency had not, by the time it completed its environmental analysis, also completed a detailed mitigation plan does not mean that the agency had not considered the environmental impacts of the project, as NEPA requires. In this instance, the supplemental environmental impact statement and the record of decision describe in detail the expected environmental effects of the project *without mitigation*. *Elk Creek Supplemental Statement* 33-46; Pet. App. 56a. These documents provide a complete inventory of the species affected by the project and fully describe the environmental effects, including displacement of certain wildlife. The documents further indicate the agency's intention to attempt to mitigate some of those effects and describes generally the measures that will be considered, but no specified environmental benefits were described or relied upon by the decisionmakers. Rather, the decision was made to proceed in the knowledge that certain adverse environmental effects would occur unless mitigated. The decisionmaker therefore was specifically aware of and had fully evaluated those impacts. This is all that NEPA requires.

This argument rests on a fundamental misconception. As we explained in our petition (at 15-18), NEPA nowhere requires or even mentions worst case analysis. The CEQ adopted the worst case requirement as a regulatory innovation, which NEPA authorized but did not require. Thus, when the CEQ determined that worst case analysis actually impeded – rather than advanced – NEPA's goals, it was free to rescind that purely regulatory requirement. None of the decisions cited by respondents holds or suggests otherwise.

For example, *Sierra Club* v. *Sigler*, 695 F.2d 957, 970-971 (5th Cir. 1983), the source of much confusion on this issue, simply held that NEPA allowed the CEQ to promulgate the worst case regulation, noting that the regulation "codifie[d]" certain judicially-recognized NEPA principles, including the need for "reasonable forecasting and speculation" concerning the probabilities of the occurrence of certain environmental impacts and the costs of proceeding without more and better information. That decision does not suggest that worst case analysis is itself fundamental to NEPA or that the technique is a necessary mechanism for satisfying NEPA's goals.

Nor does this Court's decision in *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 100 (1983), support respondents' suggestion (Br. in Opp. 10-11) that NEPA requires worst case analysis when critical information is lacking or there exists scientific uncertainty concerning a reasonably foreseeable environmental impact. That case neither discussed nor imposed the worst case analysis requirement. At most, it stands for the proposition that an agency complies with NEPA by adequately considering and disclosing the uncertainties surrounding the agency's assumptions. *Baltimore Gas & Elec. Co.*, 462 U.S. at 99-100. This, however, is a far cry from a holding that worst case analysis is required any time there is a lack of scientific certainty over potential environmental impacts.

None of the other cases cited by respondents even discuss, much less require, worst case analysis.[4]

Respondents recognize (Br. in Opp. 11) that the CEQ, which was created specifically to implement NEPA, is empowered to issue rules instructing federal agencies how to comply with NEPA. And, as respondents grudgingly concede (*ibid.*), the CEQ's interpretation of the statute is entitled to substantial deference. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). Contrary to respondents' suggestions (Br. in Opp. 11 n.8), deference is particularly appropriate here. The CEQ promulgated the current regulation with the greatest deliberation and only after determining that the worst case regulation was "unproductive and ineffective" (51 Fed. Reg. 15618, 15620 (1986)). See also Pet. 16 n.14. Although the new regulation does away with

[4] See *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Comm'n*, 481 F.2d 1079, 1082 (D.C. Cir. 1973) (discussing need for reasonable forecasting and speculation under NEPA); *Carolina Environmental Study Group* v. *United States*, 510 F.2d 796, 799 (D.C. Cir. 1975) (agencies must consider the probabilities of the occurrence of environmental effects in considering their impact); *Alaska* v. *Andrus*, 580 F.2d 465, 473 (D.C. Cir.), vacated in part, 439 U.S. 922 (1978) (decisionmakers must consider the cost of proceeding without more and better information). The CEQ was well aware of these cases when it rescinded the worst case requirement. See 51 Fed. Reg. 15625 (1986). It specifically rejected the suggestion that they "required worst case analysis" (*ibid.*), explaining (*ibid.*):

> The "worst case analysis" requirement was a technique adopted by CEQ as a means of achieving the goals enunciated in such case law. The "worst case" requirement itself, however, was clearly a "major innovation". Comment, *New Rules for the NEPA Process: CEQ Establishes Uniform Procedures to Improve Implementation*, 9 Envt'l L. Rep. 10,005, 10,008 (1979).

As the CEQ further explained, it "has since observed difficulties with the technique of 'worst case analysis' and is replacing it with a better approach to the problem of incomplete or unavailable information in an [environmental impact statement]." 51 Fed. Reg. 15625 (1986).

the worst case requirement, it "does not, however, eliminate the requirement for federal agencies to evaluate the reasonably foreseeable significant adverse impacts of an action, even in the face of unavailable or incomplete information" (51 Fed. Reg. 15621 (1986)).[5] The court of appeals erred in overturning this well-reasoned and fully deliberated regulatory change. Its decision to overrule the CEQ on a significant matter so clearly within the agency's expertise plainly warrants review.[6]

[5] The current version provides that agencies lacking information about reasonably foreseeable environmental impacts must obtain and include the information if "the overall costs of obtaining it are not exorbitant." Pet. App. 70a; 40 C.F.R. 1502.22(a). If the information cannot be obtained, the agency must include in the environmental impact statement (Pet. App. 70a-71a; 40 C.F.R. 1502.22(b))—

> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

[6] The court of appeals compounded its error by invoking the rescinded worst case requirement in a case where there are, in fact, no genuine "gaps in relevant information or scientific uncertainty" (Pet. App. 71a; 40 C.F.R. 1502.22 (1985)). The court found that the Army Corps of Engineers' "assessment of turbidity due to Elk Creek Dam is subject to uncertainty" for the sole reason that the Oregon Department of Fish and Wildlife submitted a comment disagreeing with the Corps' assessment of the dam's likely contribution to the total flow of the Rogue River (Pet. App. 14a). Whatever "scientific uncertainty" means, it surely cannot exist simply because a participant or observer disagrees with the agency's analysis. Such disagreements among interested parties and experts are endemic to environmental analysis, as they are to almost any process that involves complex decisions affecting competing interests. If disagreements like that at issue here amount to "scientific uncertainty," then virtually every environmental impact statement would be subject to the Ninth Circuit's "worst case" requirement. This cannot be a correct or sustainable result, even under the former regulation.

3. Respondents defend on factual grounds (Br. in Opp. 12-16) the court of appeals' decision requiring further supplementation of the environmental impact statement. They recognize (*id.* at 12-13) that an agency's duty to supplement turns on a question of scientific fact, namely whether the agency or commentators have uncovered significant new information concerning environmental effects. See 40 C.F.R. 1502.9(c)(1)(ii). They then argue (Br. in Opp. 12) that the court "properly found that significant new information triggered an established procedural obligation to prepare a supplemental statement."[7] Plainly, they misapprehend the court of appeals' limited role.

The court of appeals had no authority to engage in the sort of de novo factfinding employed here. See, *e.g.*, *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985). The district court, which reviews agency action under the standards set forth in the Administrative Procedure Act (APA), 5 U.S.C. 706, had primary responsibility for addressing challenges to agency action based on factual disputes. Furthermore, even that court was obligated to "be at its most deferential" when examining the agency's scientific determinations (*Baltimore Gas & Elec. Co.*, 462 U.S. at 103). The court of appeals' role in this case was limited to re-

[7] Indeed, they assert that the court was not only justified but required to undertake "an exhaustive review of the facts" (Br. in Opp. 12) and that the court "thus examined the evidence to ascertain whether new information provided by the Oregon Department of Fish and Wildlife * * * and the United States Soil Conservation Service * * * rose to the necessary level of 'significance' " (*id.* at 13 (citation and footnote omitted)).

viewing the district court's determination that the agency's action was not "arbitrary and capricious" (see *id.* at 97-98, 105-106). Contrary to respondents' arguments, the question here is not simply whether the court of appeals' factual determination is supported by the evidence; the question is whether the court of appeals acted within the bounds of its authority in making that determination. See Pet. App. 28a (Wallace, J., dissenting). Indeed, respondents' vigorous defense of the court of appeals' de novo factfinding simply underscores the need for this Court's review of that practice.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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PETITIONER'S

BRIEF

(7)

No. 87-1704

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

OREGON NATURAL RESOURCES COUNCIL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITONERS

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement: (a) a fully developed plan to mitigate environmental harm; and (b) a "worst case" analysis of potential environmental harm if relevant information is unavailable or too costly to obtain.

2. Whether the Army Corps of Engineers gave adequate consideration to new information concerning environmental effects that was presented after the completion of the environmental impact statement.

PARTIES TO THE PROCEEDING

The petitioners are John O. Marsh, Jr., in his official capacity as Secretary of the Army, and Elvin R. Heiberg, III, in his official capacity as Chief of Engineers of the United States Army.

The respondents are Oregon Natural Resources Council, Oregon Guides and Packers Association, Inc., Rogue Flyfishers, Inc., and Rogue River Guides Association.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1704

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

OREGON NATURAL RESOURCES COUNCIL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-29a) is reported at 832 F.2d 1489. The original opinion of the court of appeals is reported at 820 F.2d 1051. The opinion of the district court (Pet. App. 30a-51a) is reported at 628 F. Supp. 1557.

JURISDICTION

The court of appeals entered its judgment (Pet. App. 68a) on November 24, 1987. The court of appeals denied the government's petition for rehearing on December 10, 1987 (Pet. App. 69a). On February 18, 1988, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 30, 1988. On March 23, 1988, Justice O'Connor further extended the time for filing the petition to and including April 14, 1988, and the petition was filed on that date. This Court

granted the petition for a writ of certiorari on June 27, 1988, consolidating this case with *Robertson* v. *Methow Valley Citizens Council*, No. 87-1703.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides, in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: • • • (2) all agencies of the Federal Government shall–
>
> • • • • •
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Pertinent excerpts from the federal regulations involved in this case are reproduced in the Addenda.

STATEMENT

Petitioners seek reversal of a court of appeals decision overturning a district court's determination that the Army Corps of Engineers had fully complied with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, in authorizing the completion of the Elk Creek Dam.

[1] We have simultaneously submitted a separate brief in *Robertson*.

1. In 1962, after thirty years of consideration and planning, Congress authorized the Rogue River Basin Project, a three-part flood control project on the Rogue River. Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1192-1193. The Project, which includes three multiple purpose dams to be built and administered by the Army Corps of Engineers, was designed primarily for flood control, but it was also envisioned to serve other purposes, including the enhancement of fish and wildlife, municipal and industrial water supplies, irrigation and recreation. See *Elk Creek Lake Environmental Impact Statement* Supp. No. 1 (Dec. 1980) [hereinafter *Elk Creek Supplemental Statement*] (Summary).[2]

Two of the Project's three dams–the Lost Creek Dam on the Rogue River and the Applegate Dam on the Applegate River–have been completed and are in operation. This case concerns the third structure–the Elk Creek Dam–located 1.7 miles above Elk Creek's confluence with the Rogue River. The dam is to be a 238-foot-high roller compacted concrete structure. When completed, the dam will control runoff from 132 square miles of the 135-square-mile Elk Creek watershed. At full pool, the lake created by the dam will be 6.2 miles long, have 18 miles of shoreline, and cover 1,290 acres of land. It will hold 101,000 acre feet of water, a particularly important feature for downstream water users during the late summer and early fall low river flow periods. See *Elk Creek Supplemental Statement* 3.

The Elk Creek Dam is designed to be operated in conjunction with the Lost Creek Dam. Water releases will be controlled from a "multiport" structure, which will discharge waters from five reservoir levels ranging from 1,525 to 1,705 feet above sea level. This multiport design will enable reservoir managers to control the temperature, turbidity, and volume of released water, thereby enhancing water quality during periods of low water flow and minimizing adverse effects downstream. *Elk Creek Supplemental Statement* 7-10.

[2] For the Court's convenience, we have lodged copies of the *Elk Creek Supplemental Statement* with the Clerk of the Court.

2. In 1971, the Corps completed and filed with the Council on Environmental Quality (CEQ) the Final Environmental Impact Statement for the Elk Creek portion of the Rogue River Basin Project. Pre-construction activities began in 1972 with the relocation of a county road along the southwestern portion of the Elk Creek Valley and the acquisition of more than 2,600 acres of land for project management purposes and recreation. Project activity stopped, however, when a controversy arose over the dam's effect on the downstream water quality in the Rogue River. The Corps suspended the project pending resolution of the continuing dispute. See *Elk Creek Supplemental Statement* Preface 1, 3.

In December 1980, the Corps released the *Elk Creek Supplemental Statement*, a supplemental environmental impact statement prepared pursuant to Section 102 of NEPA, 42 U.S.C. 4332. The *Elk Creek Supplemental Statement* specifically discussed concerns that Elk Creek Dam could adversely affect water quality and aquatic ecosystems and, in particular, could increase the turbidity of the Rogue River. Turbidity received special attention because high turbidity levels impair flyfishing, a major source of recreation on the Rogue, which has been designated, pursuant to the Wild and Scenic Rivers Act of 1968, 16 U.S.C. (& Supp. IV) 1271 *et seq.*, as a part of the national wild and scenic river system (16 U.S.C. 1274(a)(5)). The *Statement* also discussed changes in river temperature, which can affect aquatic species. See *Elk Creek Supplemental Statement* 33-34, 35-37.

With respect to turbidity, the Corps summarized its conclusions as follows (*Elk Creek Supplemental Statement* (Summary)):

> The effects of the proposed Elk Creek project on turbidity levels in the Rogue River downstream of Elk Creek [have] been a major item of public concern. Moderate to high levels of turbidity during periods of high runoff [are] characteristic of Elk Creek under existing conditions. The concern has been that the reservoir would accumulate turbid water and prolong the duration of turbid flows downstream of the dam. Studies comparing actual turbidity levels and durations in Elk Creek with anticipated conditions with the project in operation indicate that although the duration of turbid flow downstream would be increased, the maximum level of turbidity in the stream would be reduced.

The Corps based that conclusion, in part, on the results of a water sampling program, initiated in 1972, to determine the natural levels of turbidity in the project area (*Elk Creek Supplemental Statement* 21-22). The results indicated that Elk Creek, in its natural state, experiences episodes of moderate to high turbidity during periods of high runoff (*id.* at 22). The Elk Creek Dam would be expected to modulate this condition by prolonging the duration of downstream turbid flow at reduced levels of turbidity.

The Corps also relied on the results of its 1974 report, entitled *Rogue River Basin, Water Temperature and Turbidity* (A.R., Doc. No. 4) [hereinafter *1974 Water Quality Report*], which analyzed data on the Rogue River from several years, representing low, high, average, and worst-known flow conditions. See *Elk Creek Supplemental Statement* 33. Using computer simulations, the report projected temperature, flow, and turbidity in the Rogue River Basin for the Lost Creek and Elk Creek dams operating in combination during low, high, average, and worst flow conditions (*ibid.*). The report also analyzed the projects under several different operational conditions—*e.g.*, for flood control only, for irrigation uses, and for other purposes—and compared the results to the system without the dams in place. It concluded that during the summer the entire project would increase turbidity " 'by 2 to 3 JTU in low and average runoff years and by up to 6 to 9 JTU during high runoff years' " (*ibid.* (quoting the *1974 Water Quality Report*)).[3] By itself, the Elk

[3] A "JTU"—or Jackson Turbidity Unit—is a unit of measurement for water clarity. As a general rule, the turbidity limit for drinking water is 5 JTU, turbidity of 10 JTU impairs flyfishing, turbidity of 20 JTU impairs other fishing methods, and a long-term turbidity of 50 JTU alters fish behavior. *Elk Creek Supplemental Statement* 21.

Creek Dam was projected to contribute from " '1 to 3 JTU's' " (*ibid.*). The report further concluded that the Elk Creek Dam would increase temperature from " 'one to two degrees F[ahrenheit]' " (*ibid.*).

The Corps also relied upon a further study, prepared in 1979, entitled the *Elk Creek Lake Water Quality Update Study* (contained in A.R. Doc. No. 6, App. C) [hereinafter *1979 Water Quality Report*]. See *Elk Creek Supplemental Statement* 33-34. That report reevaluated the turbidity potential of the Elk Creek watershed and compared the *1974 Water Quality Report*'s computer-based projections for turbidity at Lost Creek with actual turbidity measurements taken after completion of that dam in 1977 (*Elk Creek Supplemental Statement* 33-34). The results "increased technical confidence in the mathematical model predictions of the [*1979 Water Quality Study*] and reinforced the conclusions of the 1974 Water Temperature and Turbidity Report" (*Elk Creek Supplemental Statement* 34).

Based on the foregoing studies, the *Elk Creek Supplemental Statement* concluded that the increase in turbidity caused by the Elk Creek Dam would have only minor effects on fish production but that the combined effect of Lost Creek and Elk Creek dams on the turbidity of the Rogue River would impair angling to some degree (*Elk Creek Supplemental Statement* 36-37). The *Statement* also discussed measures to be taken to mitigate the dam's effects on aquatic life (*id.* at 35-37). The most significant effect on fish—the loss of spawning grounds for coho salmon and steelhead trout—had already been mitigated through the construction of the Cole M. Rivers Fish Hatchery, with the capacity to release nearly 700,000 juvenile salmon and trout each year (*id.* at 35-36). In addition to the fish hatchery, sediment settling within the reservoir and the dam's multiport intake design would minimize turbidity effects on fish production (*id.* at 37). The *Statement* concluded that "[a]verage annual downstream turbidity will be the same with or without the project" (*ibid.*).

The *Elk Creek Supplemental Statement* also discussed the project's effects on vegetation and wildlife and set forth an inventory of the major species affected by the project, including endangered and threatened species (*Elk Creek Supplemental Statement* 23-27, 38, App. B). No endangered species were found to exist in the project area, but up to 100 black tail deer were believed to reside there and 17 elk had been sighted at the location (*id.* at 26). Construction of the Elk Creek reservoir, which would inundate 1,290 acres of wildlife habitat, would adversely affect the deer and elk, as well as game bird populations (*id.* at 38).

The *Elk Creek Statement* suggested that mitigation could be accomplished by managing selected lands to improve the quality of habitat, thereby augmenting their wildlife carrying capacity (*Elk Creek Supplemental Statement* 6, 38). The *Statement* specifically endorsed the use of habitat manipulative techniques, including development of palatable browse plants for deer and vegetation interfaces—or "edge"—for quail, variation of foliage height, and placement of snags in the reservior (*ibid.*). It explained that the specific mitigation measures would be developed based upon the results of a wildlife compensation plan currently underway at Applegate Dam and upon the further recommendations of federal and state agencies (*id.* at 6). The *Statement* fully recognized, however, that even with mitigation, some species would be adversely affected by the project (*id.* at 38, 46).

3. The Corps' Division Engineer reviewed the *Elk Creek Supplemental Statement* and, on February 19, 1982, concluded that the project should proceed, subject to congressional approval of funding (Pet. App. 52a-58a). He noted that the project would have environmental impacts, but "[a]ll practical means have been incorporated into the project plans to avoid or minimize environmental harm and to mitigate for loss of fish and wildlife habitat" (*id.* at 57a-58a). Furthermore, "[t]he benefits to be realized through construction of Elk Creek Lake outweigh the economic and environmental costs, and completion of this project represents the course of action, which, on balance, serves the overall public interest" (*id.* at 58a).

The Corps proceeded to conduct a water quality study pursuant to Section 404 of the Clean Water Act (33 U.S.C. (& Supp. IV) 1344), which was completed in 1983 (see Pet. App. 33a). It also redesigned certain portions of the dam (*ibid.*). The Corps, which has promulgated regulations setting forth procedures for agency compliance with NEPA (see 33 C.F.R. 230.1 *et seq.*), prepared an environmental assessment, in accordance with 33 C.F.R. 230.9, to determine whether another supplemental environmental impact statement was necessary to discuss those changes. The Corps determined that they resulted in no significant impacts. See 33 C.F.R. 230.10. It accordingly prepared a supplemental information report pursuant to 33 C.F.R. 230.11(d), which provides for issuance of such reports "to provide supplemental information to a point of concern" previously discussed in an environmental impact statement. See Pet. App. 33a.

In August 1985, Congress appropriated the funds necessary to complete the Elk Creek Dam and directed the Corps to finish the project without further delay (Pet. App. 33a-34a & n.5). See Act of Aug. 15, 1985, Pub. L. No. 99-88, Tit. I, 99 Stat. 314; see also S. Rep. 99-82, 99th Cong., 1st Sess. 97 (1985). The dam is now approximately one-third built, with intake and outlet structures complete. More than six miles of road and utilities have been relocated and the river has now been rechannelled through the dam.

4. In October 1985, respondents Oregon Natural Resources Council, et al., brought this action in district court to enjoin construction of the Elk Creek Dam. The district court held an evidentiary hearing, rejected each of respondents' six NEPA-related claims, and entered judgment against respondents (Pet. App. 30a-51a). First, the court concluded that the *Elk Creek Supplemental Statement* properly considered the Elk Creek Dam's cumulative environmental impact by analyzing its effects in terms of the entire Rogue River Basin Project (*id.* at 37a-38a). The court next held that the *Statement* adequately described the affected area (*id.* at 38a-39a) and the environmental effects of

the proposed project, including the opportunities to mitigate environmental harm (*id.* at 40a-42a). The court rejected respondents' argument that the Corps' discount factor failed to provide a reasoned basis for choosing among alternatives (*id.* at 42a-45a). The court also rejected respondents' argument that the Corps' scientific methodology was unreliable and that a "worst case" analysis was therefore required (*id.* at 45a-46a).

Finally the court held that the Corps was not required to prepare another supplemental environmental impact statement to address new information, which was not available to the Corps at the time it prepared the *Elk Creek Supplemental Statement*, concerning the project's potential environmental effects (Pet. App. 46a-49a). Respondents cited as new information a report prepared by the Oregon Department of Fish and Wildlife (ODFW) entitled *Lost Creek Dam Fisheries Evaluation Phase I Completion Report* (A.R. Doc. No. 92) [hereinafter *ODFW Report*] which described the effects of constructing the Lost Creek Dam on fisheries resources.[4] Respondents also cited as new information a Soil Conservation Service survey of Elk Creek soil characteristics [hereinafter *SCS Report*].[5] The district court agreed with the Corps that neither the *ODFW Report* nor the *SCS Report* contained significant new information requiring supplementation of the existing Elk Creek studies.

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[4] As the district court noted (Pet. App. 47a), respondents actually relied on an internal memorandum by two ODFW staff biologists [hereinafter *Cramer Memorandum*] that expressed concern, based on the draft *ODFW Report*, that the Elk Creek Dam could adversely affect fishery resources. We have reproduced the *Cramer Memorandum*, which is not a part of the administrative record, as Addendum B, *infra*, 3a-6a. See also Plaintiffs' Brief in Support of Plaintiffs' Motions for a Temporary Restraining Order Etc. Exh. 14 (Nov. 1, 1985). After obtaining the opinions of two independent fisheries experts, the Corps issued a supplemental information report [hereinafter *Elk Creek SIR*] explaining, among other matters, why the *Cramer Memorandum* and the *ODFW Report* do not contain significant new information (Pet. App. 59a-67a). For convenience, we have reproduced the *Elk Creek SIR* as Addendum C, *infra*, 7a-13a.

[5] The *SCS Report*, which consists of a series of maps, appears in the record as hearing exhibits 1 through 8. See Pet. App. 47a n.15.

5. Respondents appealed, and a divided court of appeals affirmed in part and reversed in part (Pet. App. 1a-2a). The court first held that the *Elk Creek Supplemental Statement* failed to satisfy NEPA because it lacked a detailed plan to mitigate harm to wildlife (*id.* 4a-7a). The court stated (*id.* at 7a): "The importance of a mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement." The court next held that the Corps must prepare a new supplemental environmental impact statement to discuss the information contained in the *ODFW* and *SCS* reports (*id.* at 7a-13a). The court rejected the Corps' scientific evaluation of the new information. It concluded, contrary to the Corps and the district court, that the new information is significant (*id.* at 11a).

The court further concluded that "the Corps' assessment of turbidity due to Elk Creek Dam is subject to uncertainty" (Pet. App. 14a) and that the Corps must therefore either conduct additional research or prepare a "worst case" assessment of environmental harm (*id.* at 13a-15a). Finally, the court held that the Corps failed to take "a hard look at the cumulative environmental impacts" (*id.* at 16a) and must therefore supplement that portion of the Corps study (*id.* at 17a). The court affirmed the remainder of the district court's determinations (*id.* at 17a-20a) and remanded the case for "entry of appropriate injunctive relief" (*id.* at 21a).

Judge Wallace dissented in part (Pet. App. 21a-29a). He principally concluded, after a careful canvassing of the scientific evidence, that the Corps acted reasonably in declining to prepare a new supplemental environmental impact statement in response to the *ODFW* and *SCS Reports* (*id.* at 21a-28a).

SUMMARY OF ARGUMENT

The Army Corps of Engineers has fully complied with NEPA in authorizing the completion of the Elk Creek Dam. The court of appeals erred in holding that the Corps' *Elk Creek Supplemental Statement* was deficient for failing to include a "complete mitigation plan" for wildlife impacts and for failing to include a "worst case analysis" of turbidity effects. The court also erred in holding that the Corps is obligated to prepare a second supplemental environmental impact statement to discuss "new information."

1. NEPA directs federal agencies proposing actions that significantly affect the quality of the human environment to prepare a detailed statement on the environmental consequences of the proposed action. NEPA § 102(2), 42 U.S.C. 4332(2). See *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). NEPA's mandate to the agencies is "essentially procedural" (*Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978)), and the only role for the courts is to insure that the agency has taken a "hard look" at environmental consequences. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The court of appeals exceeded its proper role here. The court interpreted NEPA to create new substantive and procedural obligations, found nowhere in the statutory language or in the Council on Environmental Quality's (CEQ's) regulations implementing the Act.

a. The court of appeals erred, first, in suggesting that the agency must undertake "significant measures * * * to mitigate the project's effects" (Pet. App. 5a). As we explain in somewhat greater detail in the companion case, *Robertson* v. *Methow Valley Citizens Council*, No. 87-1703, NEPA does not dictate what actions the agency should take in response to expected environmental consequences. NEPA requires the agency to consider and inform the public of potential environmental impacts; it does not require the agency to " 'elevate environmental concerns over other appropriate considerations.' " *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98 (citation omitted). The court of appeals' suggestion that NEPA creates a substantive mitigation duty is accordingly incorrect.

The court of appeals also misconstrued NEPA's procedural requirements. The court mistakenly held that federal agencies must include in every environmental impact statement a "complete mitigation plan" for dealing with environmental harm. No

one disputes that a federal agency can and should consider mitigation opportunities when assessing the environmental consequences of a proposed action. Indeed, the CEQ's implementing regulations direct that mitigation opportunities be considered and discussed during the preparation of an environmental impact statement. But the court's inflexible requirement that an agency must prepare a "complete mitigation plan" is foreign to NEPA and would impede the goal of sound agency decisionmaking. As we explain here and in *Robertson*, a federal agency has broad discretion to determine the form and scope of the mitigation discussion in light of the particular circumstances, provided only that the environmental review as a whole satisfies NEPA's specific requirements and that the resulting decision is not arbitrary or capricious. See *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98, 100, 105-106.

In this case, the *Elk Creek Supplemental Statement*'s discussion of mitigation measures was sufficiently thorough for the decision at hand, namely, whether to proceed with completion of the Elk Creek Dam. The *Statement* identified mitigation measures but left the details to future development. The impacts on wildlife were limited, and the discussion of mitigation measures could be correspondingly limited as well. The agency, overall, took a hard look at environmental consequences and measures to ameliorate those consequences. That is all that NEPA requires. *Baltimore Gas & Elec. Co.*, 462 U.S. at 97.

b. The court of appeals also erred in requiring the Corps to prepare a "worst case analysis" with respect to "scientific uncertainty" concerning the Elk Creek Dam's effect on downstream turbidity. NEPA itself prescribes no particular method for dealing with uncertainty; the CEQ introduced worst case analysis as its prescribed method for addressing that problem. The CEQ's experience with worst case analysis revealed, however, that the method did not fulfill NEPA's objectives, and the agency therefore has replaced it with a more manageable methodology that identifies "reasonably foreseeable" environmental impacts. See 40 C.F.R. 1502.22. The court of appeals' conclusion that "NEPA case law" (Pet. App. 14a n.8) requires that agencies

continue to employ worst case analysis is based upon a misreading of those cases, which merely interpreted the worst case regulation. The court of appeals' requirement that the Corps conduct a worst case analysis is particularly unreasonable here. The court based its finding of scientific "uncertainty" on a single state agency comment that the Corps addressed in the *Elk Creek Supplemental Statement*. That comment did not give rise to "incomplete information" that is "essential to a reasoned choice among alternatives" (40 C.F.R. 1502.22). Thus, neither the old nor the new CEQ regulation is applicable here.

2. The court of appeals also erred in requiring the Corps to prepare a second supplemental environmental impact statement to address the *ODFW Report*'s information concerning fish mortality and the *SCS Report*'s information concerning soil characteristics. An agency's decision whether to prepare or supplement an environmental impact statement is subject to judicial review under the Administrative Procedure Act, which states that the agency's decision must be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706). In this instance, the Corps considered the information and determined that it was either unreliable or lacked sufficient bearing on the proposed action to warrant preparation of another supplemental statement. The Corps' judgment on this matter was supported by sound scientific reasoning, was clearly reasonable, and was entitled to deference. The court of appeals' action was particularly inappropriate here, where the district court had held a hearing to consider additional scientific evidence and affirmed the agency's conclusion.

ARGUMENT

I. NEPA DOES NOT REQUIRE FEDERAL AGENCIES TO INCLUDE IN THEIR ENVIRONMENTAL IMPACT STATEMENTS A COMPLETE PLAN TO MITIGATE ENVIRONMENTAL DAMAGE OR A "WORST CASE" ANALYSIS OF POTENTIAL ENVIRONMENTAL HARM

The National Environmental Policy Act of 1969 directs federal agencies proposing actions that significantly affect the quality of the human environment to prepare a detailed statement on the environmental consequences of the proposed action. NEPA § 102(2), 42 U.S.C. 4332(2). This procedural requirement serves two purposes: First, it obligates the agency to consider the environmental effects of the proposal; and second, it assures the public that the agency has considered environmental concerns in the decisionmaking process. *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). The federal agencies are well versed in NEPA's requirements, they commonly utilize environmental impact statements as a central element of their planning processes, and they have prepared thousands of such statements over the past 18 years.

The court of appeals' decision in this case departs from precedent and established practice to put forward a novel interpretation of NEPA's requirements that would profoundly alter the federal agencies' obligations. The court's decision would require all environmental impact statements to contain detailed and demonstrably effective plans for mitigating environmental harm and, whenever the agency lacks information or adequate scientific methodology to determine precisely a potential environmental effect, to include a "worst case" analysis. Neither NEPA, the Council on Environmental Quality's implementing regulations, nor any of this Court's precedents provides a basis for imposing those requirements. As we demonstrate below and in our brief in the companion case, *Robertson* v. *Methow Valley Citizens Council*, No. 87-1703, the court's rigid directives are

not only contrary to federal law, they would actually impede the goal of informed agency decisionmaking by preventing federal agencies from carrying out their resource management responsibilities through systematic project development.[6]

A. NEPA's Requirement That Federal Agencies Prepare A Detailed Statement on the Environmental Consequences of Major Federal Actions Does Not Impose A Substantive Obligation To Mitigate Adverse Environmental Effects Or A Procedural Obligation To Develop A "Complete Mitigation Plan"

1. This Court has clearly articulated the respective roles that NEPA assigns to the federal agencies and the courts. Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)) requires federal agencies to prepare an environmental impact statement that describes " 'every significant aspect of the environmental impact of a proposed action' " and that "inform[s] the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co.*, 462 U.S. at 97 (quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978)). While "NEPA does set forth significant substantive goals for the Nation, • • • its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 558. Furthermore, "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act" (*id.* at 548). "The procedural duty imposed upon agencies [by Section 102(2)(C)] is quite precise, and the role of the courts in enforcing that duty is similarly precise." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406

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[6] The court of appeals also erred in holding that the *Elk Creek Supplemental Statement*'s discussion of cumulative impacts of the entire Rogue River Project was inadequate (Pet. App. 16a-17a). The *1974 Water Quality Report*, which was incorporated into the *Supplemental Statement* by reference, had adequately addressed the cumulative impacts; thus, there was no need for the *Supplemental Statement* to revisit that issue. The significance of the court's factbound ruling, however, is limited to this case. We therefore have not sought correction by this Court of that error.

(1976). "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken' " (*id.* at 410 n.21 (citation omitted)). Furthermore, the courts should defer to the judgment of the Council on Environmental Quality (CEQ)—the agency responsible for assuring proper implementation of NEPA (42 U.S.C. 4344)—which has promulgated regulations for preparing environmental impact statements. See 40 C.F.R. 1501.1 *et seq.* "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

The court of appeals departed from these principles, both here and in its later decision in *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810 (1987), cert. granted, No. 87-1703 (June 27, 1988). The court concluded that NEPA requires federal agencies to assume significant new substantive and procedural obligations with respect to mitigation of environmental harm. It stated, in particular, that environmental impact statements must include a discussion of measures to mitigate adverse environmental consequences, adding that "[a]s long as significant measures are undertaken to mitigate the project's effects, the measures need not compensate completely for adverse environmental impacts" (Pet. App. 5a). The court's suggestion that NEPA imposes a substantive duty to mitigate environmental harm is obviously incorrect.[7]

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[7] The court derived that principle from *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985). As we explain (note 10, *infra*), the *Jantzen* passage does not support the court of appeals' suggestion that environmental impact statements must always provide for some mitigation; read in context, the passage states that if an agency substantially mitigates the environmental effects of its actions, it may not need to prepare *any* environmental impact statement at all. See 760 F.2d at 987. The court of appeals' imposition of a substantive duty to mitigate was even more explicit in *Methow Valley Citizens Council* v. *Regional Forester*, where the court stated that Section 102 of NEPA "requires that 'action be taken to mitigate the adverse effects of major federal actions' " (833 F.2d at 819, citing *Stop H-3 Ass'n* v. *Brinegar*, 389 F. Supp. 1102 (D. Haw. 1974)). See 87-1703 Pet. App. 17a. As we explain in our brief to this Court in that case, the court's reliance on *Stop H-3 Ass'n* (which was reversed on other grounds, 533 F.2d 434 (9th Cir.), cert. denied, 429 U.S. 999 (1976)) is misplaced.

Section 102 of NEPA, by its express terms, requires federal agencies to prepare a "detailed statement" of a proposed project's environmental consequences, including "adverse environmental effects which cannot be avoided," "alternatives to the proposed action," the relationship between "local short-term uses" and "long-term productivity," and "any irreversible and irretrievable commitments of resources" (42 U.S.C. 4332). Section 102 thus assures that all federal agencies will take environmental concerns into account in their decisionmaking processes. See *Weinberger* v. *Catholic Action*, 454 U.S. 139, 143 (1981); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980); *Andrus* v. *Sierra Club*, 442 U.S. 347, 350-351 (1979). See also 40 C.F.R. 1501.1. But Section 102 does not dictate what actions the agency should take in response to expected environmental consequences; indeed, "the Act mandates no particular substantive outcomes" (*City of New York* v. *United States Dep't of Transportation*, 715 F.2d 732, 748 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984)). Instead, NEPA leaves substantive decisions to the agency. As this Court has repeatedly emphasized, NEPA requires the agency to consider and inform the public of potential environmental impacts; it does not require the agency to " 'elevate environmental concerns over other appropriate considerations.' " *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98 (quoting *Strycker's Bay Neighborhood Council, Inc.*, 444 U.S. at 227). Accord *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 558; *Kleppe* v. *Sierra Club*, 427 U.S. at 410 n.21. The court of appeals' suggestion that NEPA imposes a substantive duty to mitigate adverse environmental effects is thus patently incorrect.[8]

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[8] When Congress has wished to impose substantive environmental protection obligations on federal agencies, it has done so explicitly. For example, Congress specified in the Endangered Species Act of 1973 (ESA), Pub. L. No.

2. Here, as in *Methow Valley Citizens Council*, the court of appeals' misperception of NEPA's function has led the court to misconstrue the statute's formal requirements. The court's erroneous premise that NEPA requires federal agencies to mitigate adverse environmental effects prompted it to construct a rigid and unwarranted procedural regime for developing mitigation measures. The court concluded that whenever a federal agency prepares an environmental impact statement, it must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action and "must analyze the mitigation measures in detail and explain the effectiveness of the measures" (Pet. App. 5a). The court specifically stated (*id.* at 7a):

> The importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement. Without a complete mitigation plan, the decisionmaker is unable to make an informed judgment as to the environmental impact of the project—one of the main purposes of an environmental impact statement.

The court of appeals' inflexible new procedural requirements are foreign to NEPA and would ultimately impede the goal of sound agency decisionmaking.

93-205, 87 Stat. 884, that federal agencies shall "insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species" (16 U.S.C. 1536(a)(2)). See *Roosevelt Campobello Int'l Park* v. *EPA*, 684 F.2d 1041, 1049 (1st Cir. 1982). Similarly, Congress specified in Section 4(f) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934, that the Secretary of Transportation may approve a transportation project requiring use of a public park, recreation area, wildlife refuge, or historic site only if "there is no prudent and feasible alternative to using that land; and * * * the program or project includes all possible planning to minimize harm to the [land]" (49 U.S.C. 303). These statutes, which were enacted in the same general time frame as NEPA, demonstrate that when Congress wishes to impose substantive mitigation obligations it does so expressly. The court of appeals' effort to write such a duty into NEPA would usurp Congress's deliberate contrary choice.

No one questions that a federal agency can and should consider mitigation opportunities when assessing the environmental consequences of a proposed action. The crucial issue here is the role that mitigation considerations play in the agency's environmental review. The court of appeals concluded that NEPA requires mitigation and that the government must therefore develop a "complete mitigation plan" as an essential element of an environmental impact statement (Pet. App. 7a). The government urges a fundamentally different proposition: NEPA requires environmental analysis and disclosure, and the government must therefore discuss mitigation in a manner that aids reasoned decisionmaking. See 40 C.F.R. 1502.1. "As *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas & Elec. Co.*, 462 U.S. at 100. The agency has broad discretion to determine the form and scope of the mitigation discussion in light of the particular circumstances, subject only to the requirements that the environmental review as a whole satisfies NEPA's specific requirements and that the resulting decision is not arbitrary or capricious. See *id.* at 97-98, 105-106.

The need for this flexibility becomes obvious when one considers the broad variety of contexts in which mitigation considerations may become relevant. The federal agencies must prepare an environmental impact statement (or explain why a statement is not necessary) for the full gamut of government activities, ranging from proposals for legislation, to physical construction and improvements, to the issuance of permits. In addition, federal agencies frequently find it necessary or desirable to provide a series of such statements at various stages of a single project's development.[9] The relevance of and opportunities for

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[9] The CEQ has encouraged agencies to utilize the practice of "tiering" environmental impact statements. See 40 C.F.R. 1502.20, 1508.28. Tiering is simply a method of implementing the familiar and sensible concept of staged project development. See, *e.g.*, D. Dannenbring & M. Starr, *Management Science: An Introduction* 548 (1981) ("A project is itself a combination of many varied and complex tasks or activities. These tasks are interdependent in that most cannot begin until some other task has been completed."). Tiering

mitigation vary considerably depending on the nature and complexity of the activity and the stage at which the environmental impact statement is being prepared. It would not be feasible, and often would be counterproductive, to develop a "complete mitigation plan" in every circumstance.[10]

Obviously, the agency's obligation to discuss mitigation measures will depend on the nature of the proposed agency action. The CEQ's implementing regulations, which are binding on all federal agencies (Exec. Order No. 11,991, 3 C.F.R. 123, 124 (1978)), therefore provide a flexible approach to the consideration and discussion of such measures. The regulations, which broadly define the term "mitigation" to include virtually any technique that avoids, eliminates, ameliorates, or compen-

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"is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe" (40 C.F.R. 1508.28).

[10] Prior to the Ninth Circuit's decisions here, legal challenges involving an agency's discussion of mitigation measures typically arose out of the agency's determination that mitigation measures obviated the need for an environmental impact statement. In response, the courts consistently recognized that a "Finding of No Significant Impact" (40 C.F.R. 1508.13) is appropriate if otherwise significant environmental effects will be remedied by mitigation measures built into the project. See *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d at 987; *Louisiana* v. *Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), cert. denied, 475 U.S. 1044 (1986); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears* v. *Peterson*, 685 F.2d 678, 681-684 (D.C. Cir. 1982); *Preservation Coalition, Inc.* v. *Pierce*, 667 F.2d 851, 860-861 (9th Cir. 1982); *City & County of San Francisco* v. *United States*, 615 F.2d 498, 501 (9th Cir. 1980); *Maryland-National Capital Park & Planning Comm'n* v. *U.S. Postal Service*, 487 F.2d 1029, 1039 (D.C. Cir. 1973). See also 46 Fed. Reg. 18,026 (1981). The Ninth Circuit specifically stated in this context that "so long as significant measures are undertaken to 'mitigate the project's effects,' they need not *completely compensate* for adverse environmental impacts." *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d at 987 (emphasis in original; citation omitted). The court of appeals here mistakenly cited *Jantzen* for the radically different proposition that an environmental impact statement must always provide for *some* mitigation of environmental harm. See Pet. App. 5a. See note 7, *supra*.

sates for environmental harm (40 C.F.R. 1508.2),[11] require a federal agency to consider mitigation opportunities at three stages of the NEPA review process.

First, the CEQ regulations direct that when a federal agency takes the initial step of defining the "scope" of an environmental impact statement, it should consider the adoption of mitigation measures, not already included in the proposed action, as one type of alternative to the proposed action. See 40 C.F.R. 1508.25.[12] This provision thus assures that when an agency determines the relevant range of alternatives, it will consider, in addition to the "[n]o action alternative" and "[o]ther reasonable courses of actions" (40 C.F.R. 1508.25(b)), the possibility of modifying the proposal to reduce or eliminate environmental harm.

Second, the CEQ regulations direct that once the agency has defined the scope of its environmental review, it should address mitigation in the body of the environmental impact statement when discussing proposal alternatives and environmental consequences. See 40 C.F.R. 1502.14, 1502.16. These provisions, which instruct the agency to consider "appropriate mitigation measures not already included in the proposed action or alter-

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[11] The CEQ regulations state that mitigation includes (40 C.F.R. 1508.20):

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
>
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
>
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
>
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
>
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

[12] Once an agency decides that it will prepare an environmental impact statement, it commences "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. 1501.7. The "scope" of an environmental impact statement "consists of the range of actions, alternatives, and impacts to be considered" in the document. 40 C.F.R. 1508.25.

natives" (40 C.F.R. 1502.14), thus encourage the agency to consider mitigation opportunities that were not identified in the scoping process.

Third, the CEQ regulations state that if, upon completion of the environmental analysis, the agency chooses to go forward with the proposal, it must indicate in its record of decision "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." 40 C.F.R. 1505.2(c). The record of decision must also summarize a monitoring and enforcement program "where applicable for any mitigation" (40 C.F.R. 1505.2(c)), and the agency must confirm that the mitigation measures are ultimately implemented (40 C.F.R. 1505.3). These provisions ensure that the agency will consider mitigation opportunities in making its decision and will institute any measures that are chosen.

The CEQ's regulations are "designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives" (Exec. Order No. 11,991, 3 C.F.R. 123 (1978)). They permit a federal agency to consider mitigation opportunities in a systematic fashion and in accordance with NEPA's statutory framework. The regulations neither broaden nor restrict the scope of the inquiry that NEPA mandates; instead, they provide a blueprint for compliance.[13] Furthermore, they preserve the agency's basic discretion under NEPA to determine in any particular case how far-ranging, thorough, or detailed the mitigation discussion should be.[14] The CEQ regulations, which have the characteristic

[13] Thus, the CEQ regulations require the agency to consider mitigation measures with reference to NEPA's specific criteria, including the environmental impact of the proposed action; the adverse environmental impacts that cannot be avoided; and alternatives to the proposed actions. See 42 U.S.C. 4332(2)(C).

[14] NEPA requires a "detailed statement" of environmental consequences, but it does not require that every subsidiary matter (such as mitigation) be discussed comprehensively, nor does it require—explicitly or implicitly—a

NEPA hallmark of adaptability, can be employed throughout the entire spectrum of agency decisionmaking. Furthermore, they ensure that an agency can target its discussion of mitigation to the particular decision at hand.

Given NEPA's "quite precise" procedural instructions (*Kleppe*, 427 U.S. at 406) and the CEQ's carefully crafted implementing regulations, there is no need or warrant for courts to impose additional procedures. The court of appeals' rigid new requirement that all environmental impact statements must contain a "complete mitigation plan" not only exceeds the court's proper role (see, *e.g.*, *id.* at 410 n.21), it is both unworkable and unnecessary. As this case demonstrates, that judicially coined requirement seriously impedes the NEPA review process with no corresponding benefits.

3. The Corps conscientiously complied with NEPA and the CEQ regulations in preparing the *Elk Creek Supplemental Statement* and, specifically, in discussing mitigation measures. The *Statement* discussed opportunities to mitigate harm to both fish and non-aquatic wildlife. The court of appeals did not question the adequacy of the mitigation measures for fish.[15] The court found, however, that the discussion of wildlife mitigation measures was inadequate because it was not sufficiently detailed (Pet. App. 5a-7a).

As we have explained (pages 6-7, *supra*), the *Elk Creek Supplemental Statement* determined that the project would have relatively limited impacts on wildlife. *Elk Creek Supplemental Statement* 23-27, 38. Construction of the Elk Creek Dam and the accompanying reservoir would inundate 1,290 acres of wildlife habitat, which would adversely affect black tail

detailed discussion of mitigation. Obviously, an agency's discussion of the five subjects identified in NEPA can be "detailed" even if the discussion of their subsidiary components, viewed individually, contains varying levels of detail.

[15] The most significant effect on fish—the loss of spawning grounds for coho salmon and steelhead trout—had already been mitigated through the construction of the Cole M. Rivers fish hatchery. *Elk Creek Supplemental Statement* 35-36. The fish hatchery would also compensate for decreases in fish production owing to the expected minor increase in turbidity (see *id.* at 37).

deer and elk, as well as certain game bird populations. No endangered species were found to exist in the project area, and the project was expected to affect no more than 100 deer and a lesser number of elk, reducing the size of the deer herd and displacing (but not reducing) the elk herd (*ibid.*).[16]

The *Elk Creek Supplemental Statement* suggested that these effects could be mitigated by managing selected lands nearby to improve the quality of the habitat and thereby increasing their wildlife carrying capacity. Specifically, the *Statement* suggested certain habitat manipulative techniques—development of palatable browse plants for deer and vegetation interfaces (or "edge") for quail, variation of foliage height, and placement of snags in the reservoir—to improve nearby habitat (*id.* at 6, 38). The *Statement* was clear, however, that the specific wildlife mitigation measures would be developed based upon the results of a wildlife compensation plan currently underway at the Applegate Dam and upon the further recommendations of federal and state wildlife agencies (*id.* at 6). The *Statement* also indicated that, even with adoption of mitigation techniques, some species would be adversely affected by the project (*id.* at 38, 46).

This discussion of wildlife mitigation measures fully complied with NEPA and the CEQ regulations, and it was sufficiently thorough for the decision at hand; namely, whether to proceed with completion of the Elk Creek Dam (Pet. App. 53a). The level of detail that an agency employs in its environmental discussions must, of course, be determined in light of "feasibility" and "[c]ommon sense" (*Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 551). Furthermore, the lower courts have specifically held that where mitigation details are contingent on

[16] At trial, respondents' wildlife experts estimated that the inundation would affect approximately 100 out of more than 100,000 deer in the county, reducing their number by about 50. Tr. 19-20, 22 (Jan. 16, 1986) (Werner testimony). Respondents' experts also estimated that reservoir construction would displace 60 elk that were believed to live part-time in the reservoir area, but the project was not expected to reduce this highly migratory population at all (*id.* at 18-19). These estimates are generally consistent with the information contained in the *Elk Creek Supplemental Statement*.

presently unknown factors, it is appropriate for an agency to restrict its discussion accordingly. See, *e.g.*, *Concerned Citizens on I-190* v. *Secretary of Transportation*, 641 F.2d 1, 5-6 (1st Cir. 1981).[17] Here, where the impacts on wildlife were limited, the discussion of mitigation measures could be correspondingly limited as well. The Corps and the district court both agreed that the *Elk Creek Supplemental Statement*'s mitigation discussion satisfied NEPA's requirements (Pet. App. 41a-42a, 56a-57a, 57a-58a, 61a). The agency, overall, took a "hard look" at environmental consequences and measures to ameliorate those consequences; this is all that NEPA requires. See *Baltimore Gas & Elec. Co.*, 462 U.S. at 97.[18]

[17] The *Elk Creek Supplemental Statement*'s deferral of mitigation details pending completion of current studies at the Applegate Dam is consistent with the view, expressed by the Ninth Circuit as well as other courts, that the planning process is an ongoing endeavor and that agencies should be encouraged to develop and institute mitigation measures as the project develops, even *after* the environmental analysis is complete. See *Village of False Pass* v. *Clark*, 733 F.2d 605, 616 (9th Cir. 1984); *Township of Springfield* v. *Lewis*, 702 F.2d 426, 437-438 (3d Cir. 1983); *National Indian Youth Council* v. *Watt*, 664 F.2d 220, 225 (10th Cir. 1981); *Concerned Citizens on I-190* v. *Secretary of Transportation*, 641 F.2d 1, 6 (1st Cir. 1981). See also *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978). In *Township of Springfield*, for example, the court of appeals determined that mitigation measures added to a project after circulation of the final environmental impact statement do not trigger a requirement to supplement the statement, in part because the measures were a specification of general measures spelled out in that statement. In fact, the Third Circuit noted that "the responsiveness to environmental concerns demonstrated by these changes reflects a commendable effort to comply with the spirit of NEPA.' " 702 F.2d at 438 (citations omitted).

[18] This obviously is not a case, like *Jantzen* (see note 10, *supra*), where the planned implementation of mitigation measures eliminated the need for an environmental impact statement. The *Elk Creek Supplemental Statement* provided a discussion of the project's significant environmental effects without mitigation and then identified mitigation measures that, by definition, could be expected to reduce those impacts. See *Elk Creek Supplemental Statement* 26-27, 38. See also Pet. App. 56a-58a, 61a. The *Statement*'s qualitative predictions that implementation of mitigation measures would reduce, to some degree, the adverse impacts are certainly reasonable.

The court of appeals, therefore, erred in concluding that the *Elk Creek Supplemental Statement* failed to address mitigation adequately. Moreover, the court's blanket requirement that agencies prepare a "complete mitigation plan" is both unworkable and unwise. The court's requirement pervasively conflicts with CEQ regulations[19] and would expunge from NEPA the flexibility that allows vastly different federal agencies to perform meaningful environmental analyses tailored to their functions and needs. As we explain in our brief in *Robertson* (at pages 25-38), agencies would no longer be able to plan and implement their activities through staged project development (see note 9, *supra*). As a result, the court's decision would reduce, rather than enhance, the agency's ability to conduct informed and well-reasoned decisionmaking. And the courts themselves would be forced to expend considerable energy adjudicating the ultimately discretion-laden question whether a "complete mitigation plan" is sufficiently detailed to qualify as "complete."

This Court has repeatedly emphasized that the courts have a limited role to play under NEPA. *E.g., Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98. In essentially rewriting NEPA to suit its own vision of environmental policy, the court of appeals here has clearly overstepped its proper bounds.

B. NEPA Does Not Require Federal Agencies To Prepare A "Worst Case" Analysis Of Potential Environmental Harm If Relevant Information Concerning Significant Environmental Effects is Unavailable Or Too Costly To Obtain

1. The court of appeals also erred in concluding (Pet. App. 13a) that NEPA requires federal agencies to conduct a "worst

[19] See, *e.g.*, 40 C.F.R. 1501.2, 1502.5(b) (mandating early application of NEPA); 40 C.F.R. 1502.2(a)-(c) (requiring that environmental impact statements be analytic rather than encyclopedic, that impacts be discussed in proportion to their significance, and that statements be concise and "no longer than absolutely necessary to comply with NEPA and with these regulations"); 40 C.F.R. 1502.2(f) (forbidding agencies from committing resources in a manner that will bias the agency's ultimate decision); 40 C.F.R. 1502.20 (encouraging tiered environmental analysis).

case" analysis whenever relevant scientific information on environmental effects is unavailable or too costly to obtain. NEPA itself prescribes no particular method for dealing with the problem of scientific uncertainty; instead, the CEQ introduced worst case analysis as a method for addressing that problem. The CEQ's experience with worst case analysis ultimately revealed that the method did not effectively fulfill NEPA's objectives, and the agency therefore has replaced it with a more manageable methodology that identifies "reasonably foreseeable" environmental impacts. The court of appeals nevertheless insisted that "NEPA case law" (*id.* at 14a n.8) requires that agencies continue to employ worst case analysis. The court's decision is fatally infirm. Worst case analysis is a product of the CEQ regulations only, and the case law on that subject merely interprets those regulations.

The CEQ originated the concept of worst case analysis in its 1978 implementing regulations. See 43 Fed. Reg. 55,978, 55,997. Those regulations, which were promulgated pursuant to presidential order, represented the CEQ's first attempt to provide an authoritative blueprint for NEPA compliance that would be binding on every federal agency. See *id.* at 55,978. Section 1502.22, which came to be known as the worst case requirement, described the government's obligation when information relevant to a proposed action's significant adverse environmental effects was either unavailable or incomplete. See 40 C.F.R. 1502.22 (1985).[20] Under that section, the agency was required, if possible, to obtain the information and to include it in the environmental impact statement (40 C.F.R. 1502.22(a) (1985)). If the information were truly unavailable or too costly to obtain, the agency was required to "weigh the need for the action against the risk and severity of possible adverse impacts" and to provide a "worst case analysis and an indication of the probability or improbability of its occurrence" (40 C.F.R. 1502.22(b) (1985)).

[20] This regulation, which remained unchanged from 1978 to 1985, is reproduced in full in Addendum A, page 2a, *infra*.

The CEQ gave no explanation why it chose wofst case analysis over other methods for dealing with uncertainty (see 43 Fed. Reg. 55,984 (1978)).[21] Moreover, the CEQ's regulation gave no explanation of how an agency was to go about conducting a worst case analysis. As a result, federal agencies encountered substantial difficulties in implementing the worst case requirement. The CEQ published some interpretive information (46 Fed. Reg. 18,026 (1981)) but continued to receive requests for clarification from government agencies and the private sector. Many of these inquiries criticized the regulation for failing to identify clearly the circumstances in which the worst case analysis requirement was triggered. As a result, the Council drafted guidance on the regulation and proposed to incorporate an initial threshold of probability before a worst case analysis would be required. See 48 Fed. Reg. 36,486 (1983). After receiving conflicting public comments, however, CEQ withdrew the proposed guidance to examine the issue further before publishing a new proposal. 49 Fed. Reg. 4803 (1984).

Meanwhile, the courts' interpretation of the worst case regulation, accompanied by judicial second-guessing of the agencies' scientific determinations, rendered the method largely unworkable. The courts repeatedly overturned agency worst case analyses and instructed the agency to evaluate rigorously a broad spectrum of highly remote possibilities, declaring "the specific worst case to be examined by the agency on remand, including the particular scientific models and studies to be applied and the research to be performed." Note, *Federal Agency Treatment of Uncertainty in Environmental Impact Statements Under the CEQ's Amended NEPA Regulation § 1502.22: Worst Case Analysis or Risk Threshold?*, 86 Mich. L. Rev. 777, 808

[21] It appears that the regulation grew out of the CEQ's early recognition that federal agencies cannot avoid drafting an environmental impact statement simply because information concerning a potential environmental impact is unknown. See *Scientists' Inst. for Pub. Information, Inc.* v. *AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). As the CEQ later explained, the worst case regulation was adopted to ensure that agencies would not "disregard uncertainties as having no weight in the balancing process." 50 Fed. Reg. 32,236 (1985).

(1988). See, *e.g.*, *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1244-1246 (9th Cir. 1984); *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark* (*SOCATS*), 720 F.2d 1475, 1479 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984) (White and O'Connor, JJ., dissenting); *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir.. 1983). See generally Note, *supra*, 86 Mich. L. Rev. at 798-804.

In 1984, following this Court's denial of the government's petition for a writ of certiorari in *SOCATS*, the CEQ published an advance notice of proposed rulemaking to solicit comments on possible amendment of the worst case regulation. See 49 Fed. Reg. 50,744 (1984). The following year, the CEQ published a proposed amendment that suggested eliminating the worst case analysis requirement and replacing it with a requirement that the agency consider reasonably foreseeable impacts based upon credible scientific support. See 50 Fed. Reg. 32,234, 32,238 (1985). The CEQ explained that, based on an intensive review, it had concluded that worst case analysis "is a unsatisfactory approach to the analysis of potential consequences in the face of missing information" (*id.* at 32,236). It noted that worst case analysis is unworkable, in part, because of the "limitless nature of the inquiry established by this requirement; that is, one can always conjure up a worse 'worst case' by adding an additional variable to a hypothetical scenario" (*ibid.*).[22] The CEQ further observed (*ibid.* (citation omitted)):

> Experts in the field of risk analysis and perception stated that the "worst case analysis" lacks defensible rationale or procedures, and that the current regulatory language stands "without any discernible link to the disciplines that have devoted so much thought and effort toward developing ra-

[22] As the Earl of Gloucester's son, Edgar, lamented (*King Lear*, Act IV, Scene 1):

> Who is't can say, "I am at the worst?"
> I am worse than e'er I was.
>
> • • • • •
>
> And worse I may be yet. The worst is not,
> So long as we can say, "This is the worst."

tional ways to cope with problems of uncertainty. It is, therefore, not surprising that no one knows how to do a worst case analysis . . . ."

The CEQ ultimately decided to replace the worst case regulation with a new regulation that, in that agency's judgment, provides "a wiser and more manageable approach to the evaluation of reasonably foreseeable significant adverse impacts in the face of incomplete or unavailable information in an EIS." 51 Fed. Reg. 15,620 (1986).[23] The new regulation states that if "incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement" (40 C.F.R. 1502.22(a)). If information relevant to reasonably foreseeable significant adverse impacts cannot be obtained, the agency must include four items in the environmental impact statement: (1) a statement that the information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating impacts; (3) a summary of existing credible scientific evidence relevant to evaluating impacts; and (4) the agencies' evaluation of the impacts based upon theoretical approaches or research methods generally accepted in the scientific community (40 C.F.R. 1502.22(b)).[24]

The revised regulation accordingly requires "federal agencies to evaluate the reasonably foreseeable significant adverse impacts of an action, even in the face of unavailable or incomplete information" (51 Fed. Reg. 15,621 (1986)). It "specifies that the evaluation must be carefully conducted, based upon credible scientific evidence, and must consider those reasonably

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[23] The regulation is reproduced in Addendum A, pages 1a-2a, *infra*.

[24] "Reasonably foreseeable impacts" are expressly defined to include "impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason" (40 C.F.R. 1502.22(b)).

foreseeable significant adverse impacts which are based on scientific evidence" (*ibid.*). In short, the amended regulation "retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.' " 50 Fed. Reg. 32,237 (1985).

2. The court of appeals refused to give effect to the CEQ's carefully deliberated regulatory revision, holding here—and later in *Methow Valley Citizens Council*—that NEPA requires worst case analysis irrespective of the CEQ regulations. See Pet. App. 13a-15a & n.8. The court incorrectly reasoned that the CEQ's worst case regulation is a codification of prior NEPA case law" and that "the rules embodied in the regulation remain in effect even though the regulation was rescinded" (*id.* at 14a n.8). In support of that assertion, the court of appeals summarily cited its previous decision in *Save Our Ecosystems*. But *Save Our Ecosystems* simply cites *SOCATS* for that proposition. See 747 F.2d at 1244. *SOCATS*, in turn, simply cites *Sierra Club* v. *Sigler*, 695 F.2d at 971. There the trail ends. Neither *Sigler* nor any previous case holds that NEPA requires the federal agencies to conduct a worst case analysis.

The question in *Sigler* was whether the Army Corps of Engineers was required to comply with the CEQ's worst case analysis regulation under the particular facts of that case. The Fifth Circuit first observed that while there "is some language in NEPA which may be said to endorse generally the concept of a worst case analysis" the statute's "literal language does not require a worst case analysis" (695 F.2d at 969). The court next noted that NEPA does contemplate that agencies would engage in " '[r]easonable forecasting and speculation' " concerning future environmental effects, including the "probabilities of the occurrence" and the " 'cost of uncertainty—i.e., the costs of proceeding without more and better information' " (*id.* at 970).[25] The court then stated that the "CEQ's worst case analysis merely codifies these judicially created principles" (*id.* at 971).

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[25] The court specifically cited *Scientists' Inst. for Pub. Information, Inc.* v. *AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Carolina Envtl. Study Group* v.

Thus, the Fifth Circuit concluded that the worst case regulation was the CEQ's mechanism for implementing certain judicially recognized NEPA objectives. The court did not hold that the worst case methodology was the *only* allowable mechanism for effecting those general goals. Accord Note, *supra*, 86 Mich. L. Rev. at 797-798; see also *id.* at 798 n.105, 801-802 & nn.120-121, 812-814, 819-820. Indeed, the court of appeals' conclusion here that NEPA requires a worst case analysis is inconsistent with that court's own prior case law, which recognizes that "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS." *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).[26]

United States, 510 F.2d 796, 799 (D.C. Cir. 1975); and *Alaska* v. *Andrus*, 580 F.2d 465, 473-474 (D.C. Cir. 1978), vacated on other grounds, 439 U.S. 922 (1978).

[26] The CEQ was well aware of the case law concerning the "worst case" requirement when it promulgated the new regulation. The CEQ specifically considered whether those cases mandated worst case analysis and concluded that they did not (51 Fed. Reg. 15,625 (1986)):

> Comment: Case law required worst case analysis prior to adoption of [the worst case regulation].
>
> Response: This assertion is incorrect. Case law prior to the adoption of 40 CFR 1502.22 *did* require agencies to make a "good faith effort * * * to describe the reasonably foreseeable environmental impact(s)" of the proposal and alternatives to the proposal in the face of incomplete or unavailable information, consistent with the "rule of reason" [citation omitted]. The "worst case analysis" requirement was a technique adopted by CEQ as a means of achieving the goals enunciated in such case law. The "worst case" requirement itself, however, was clearly a "major innovation." * * * The U.S. Court of Appeals for the Fifth Circuit, interpreting the "worst case analysis" requirement for the first time in a litigation context, recognized that it was an innovation of CEQ. *Sierra Club* v. *Sigler*, 695 F.2d 957, 972 (5th Cir. 1983). CEQ has since observed difficulties with the technique of "worst case analysis" and is replacing it with a better approach to the problem of incomplete or unavailable information.

A number of commenters requested CEQ to state that the new regulation is "intended to repudiate and overrule the Ninth Circuit decisions on worst case analysis" (51 Fed. Reg. 15,625 (1986)). The CEQ recognized that its new regulation did not "overrule" judicial interpretations of the worst case requirement; instead, it simply rendered them irrelevant. The agency accordingly responded that "[t]he Ninth Circuit opinions are based on the requirements of former § 1502.22 or agency reflections thereof, and are inapplicable to this revision" (*ibid.*).

The CEQ has adhered to the objectives identified in *Sigler*, but has determined that "the 'worst case analysis' requirement is an unproductive and ineffective method of achieving those goals" (51 Fed. Reg. 15,618, 15,620 (1986)). The CEQ has therefore adopted "a wiser and more manageable approach to the evaluation of reasonably foreseeable significant adverse impacts in the face of incomplete or unavailable information" (*id.* at 15,620). The court of appeals' decision in this case would effectively rescind the CEQ's new regulation and, contrary to that court's own decision in *Trout Unlimited*, would install worst case analysis as a permanent feature of NEPA compliance.

This aspect of the court of appeals's decision is obviously contrary to this Court's holding that the CEQ's judgment is entitled to substantial deference, even when the agency alters its prescribed procedures for NEPA compliance. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). See also, *e.g.*, *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967); *Sierra Club* v. *Sigler*, 695 F.2d 957, 967, 972 (5th Cir. 1983) (recognizing that NEPA requires adherence to CEQ regulations, even when CEQ changes its intepretation, and that CEQ regulations are entitled to substantial deference).[27] And, as is true of its novel mitigation requirements, the court of appeals' holding here would have severe consequences. As the CEQ has explained, requiring a worst case analysis forces federal agencies to conduct wasteful and time-consuming inquiries into speculative impacts that lack "a firm connection between credible science and the hypothetical consequences of an agency's proposed action" (50 Fed. Reg. 32,236 (1985)). This sort of "pure conjecture * * * lacking a credible scientific basis is *not* useful to either the decisionmaker or the public" (*ibid.* (emphasis in original)). The CEQ, after careful deliberation, prop-

[27] Even the respondents concede (Br. in Opp. 11) that the CEQ's judgment is entitled to "substantial deference."

erly elected to eliminate its worst case analysis requirement. The court of appeals improperly relied on a "contrived 'common law' rationale for overruling the CEQ" (Note, *supra*, 86 Mich. L. Rev. at 820).

3. The court of appeals' imposition of the worst case requirement here was particularly far-reaching because there were no meaningful "gaps in relevant information or scientific uncertainty" (40 C.F.R. 1502.22 (1985)) in this case. The court found that "the Corps' assessment of turbidity due to Elk Creek Dam is subject to uncertainty" based on a single comment from the ODFW addressing the *Elk Creek Supplemental Statement's* observation that Elk Creek provides a small portion of the Rogue River's total flow (Pet. App. 14a). According to the court of appeals, "[t]he state agency specifically disagreed with the Corps' finding that Elk Creek would make only a small contribution to total flow in the Rogue River" (*ibid.*). In fact, the Corps had considered and addressed conditions in which Elk Creek would contribute higher flows to the Rogue.[28]

Whatever the merits of the ODFW's comment, it does not, we submit, give rise to a case of incomplete information within the meaning of either the old or the new version of 40 C.F.R. 1502.22. Section 1502.22's requirements do not come into play whenever a commenting party disagrees with the agency; rather, they apply only when information "essential to a reasoned

[28] The ODFW stated that it is "probably true in many cases" that the project would contribute only a small percentage of the flow to the Rogue, but added that "in other situations such as during flood control operations or during the summer when releasing storage there may be periods when Elk Creek provides a significant percentage of the total flow of the Rogue." *Supplemental Statement* 68 (Comment 6-5). In response, the Corps explained that it was aware that "[d]uring high flow periods, Elk Creek could contribute up to about 25 percent of the flow in the Roque River * * *. During other periods, the percentage would be considerably lower." *Id.* at 70 (Response to Comment 6-5). And, as the Corps further noted, this fact had been fully evaluated in the *1974 Water Quality Report*, which had been incorporated into the *Supplemental Statement* by reference and was available in Corps offices for public review (*ibid.*).

choice among alternatives" is lacking.[29] The Corps, an expert agency charged with making such determinations, found no such lack of essential information here. Its determination, which is entitled to deference, is both reasonable and manifestly correct. Accordingly, neither the old nor the new CEQ regulation concerning incomplete information is applicable to this situation.

II. THE ARMY CORPS OF ENGINEERS GAVE ADEQUATE CONSIDERATION TO INFORMATION CONCERNING ENVIRONMENTAL EFFECTS THAT WAS PRESENTED AFTER THE COMPLETION OF THE CORPS' SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

The court of appeals also erred in requiring (Pet. App. 7a) the Corps to prepare a second supplemental environmental impact statement to address the *ODFW Report*'s information concerning fish mortality and the *SCS Report*'s information concerning soil characteristics. The Corps had considered the information in both instances and determined that it was either unreliable or lacked sufficient bearing on the proposed action to warrant preparation of another supplemental statement. The district court, which heard and considered the testimony of witnesses on these technical subjects, agreed that the Corps' decision to forgo preparation of another supplemental environmental impact statement was reasonable (Pet. App. 46a-

[29] An environmental impact statement "need not achieve unanimity on the desirability of proceeding with the proposed action" (*Life of the Land* v. *Brinegar*, 485 F.2d 460, 473 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974)). Obviously, even the best scientific information is subject to disagreement among experts. The CEQ envisions that the environmental impact statement will bring the bulk of those disagreements to the attention of the decisionmaker through the comment and response section. See 40 C.F.R. 1503.1 *et seq.* Section 1502.22 is strictly limited, by contrast, to incomplete information "essential to a reasoned choice among alternatives" (40 C.F.R. 1502.22). Indeed, if disagreements like that at issue here were to require resort to Section 1502.22's procedures, the process of preparing environmental impact statements would become a potentially interminable exercise in abstract scientific debate. This was not the CEQ's intention and is not a reasonable result.

49a). The court of appeals nevertheless reversed that judgment. As Judge Wallace observed in dissent (Pet. App. 21a-28a), the court of appeals departed from its proper appellate role. Rather than examining the district court's decision under the appropriate standard of review, the court assumed the role of a de novo factfinder charged with responsibility for making scientific determinations (*id.* at 28a).

1. Federal agencies frequently develop or receive new and updated information, prior to a project's completion, arguably relevant to the project's environmental effects. When the agency receives such information after the publication of its environmental impact statement, it must determine whether the information is sufficiently important to require reinvocation of NEPA's formal environmental evaluation procedures.[30] That determination requires a pragmatic assessment of the information's value in the decisionmaking process.[31] Furthermore, the determination, like other agency judgments concerning the extent of environmental analysis required, typically "requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies" (*Kleppe* v. *Sierra Club*, 427 U.S. at 412). The scope of judicial inquiry is correspondingly limited. See *ibid.*; *Baltimore Gas & Elec. Co.*,

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[30] Both the Corps and the CEQ regulations implementing NEPA instruct an agency to prepare a supplemental environmental impact statement if the agency determines that the new information has "significant" relevance or bearing on the proposed action or its effects. See 33 C.F.R. 230.11(b) (Corps NEPA regulations); 40 C.F.R. 1502.9(c)(ii) (CEQ regulations).

[31] As this Court observed in *Vermont Yankee Nuclear Power Corp.*:

> "Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is reviewed]. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact has been discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."

435 U.S. at 554-555 (quoting *ICC* v. *Jersey City*, 322 U.S. 503, 514 (1944)).

462 U.S. at 97-98; *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 554-555.

The Administrative Procedure Act (APA) identifies the appropriate standard of judicial review. A reviewing court may not set aside an agency's decision to forgo preparation or supplementation of an environmental impact statement unless the agency action is "arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). See *Wisconsin* v. *Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984); *Webb* v. *Gorsuch*, 669 F.2d 157, 159 (4th Cir. 1983); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears* v. *Peterson*, 685 F.2d 678, 681, 685 (D.C. Cir. 1982); *Hanly* v. *Kleindienst*, 471 F.2d 823, 828-830 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).[32] While the *agency* employs a "reasonableness standard" in determining whether a supplemental environmental impact statement is necessary (see, *e.g.*, *Friends of the River* v. *FERC*, 720 F.2d 93, 109 (D.C. Cir. 1983)), the courts must apply the APA standard in reviewing the agency's choice. There is no warrant for creating a less deferential standard of judicial review.[33]

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[32] As the Seventh Circuit noted (*Wisconsin*, 745 F.2d at 417 n.5), a number of courts—including the Ninth Circuit—do not follow the APA standard in these circumstances; instead, they evaluate the agency's decision whether to prepare or supplement an environmental impact statement based on whether the decision is "reasonable." See, *e.g.*, Pet. App. 8a; *Enos* v. *Marsh*, 769 F.2d 1363, 1372 (9th Cir. 1985); *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983); *Minnesota Public Interest Research Group* v. *Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974) (en banc); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244, 1248-1249 (10th Cir. 1973). The Fifth Circuit apparently originated that practice in *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463 (1973), a case decided prior to *Vermont Yankee Nuclear Power Corp.* and *Kleppe*, reasoning that the "spirit of [NEPA] would die aborning" if the APA standard were applied (472 F.2d at 466). One may debate how significant the difference is between the two standards; the fact remains that the APA expressly specifies review under the "arbitrary [or] capricious" standard.

[33] Furthermore, there is no need for a less deferential standard. As the Second Circuit explained (*Hanly*, 471 F.2d at 829-830):

> We see no reason for application of a different standard here since the APA standard permits effective judicial scrutiny of agency action and concomitantly permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise.

In applying the "arbitrary or capricious" standard, the court of appeals and the district court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" (*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971)). The courts must, however, give appropriate deference to the agency, especially with respect to scientific judgments within an agency's expertise. See *Baltimore Gas & Elec. Co.*, 462 U.S. at 103. Here, as with other NEPA inquiries, "[a]bsent a showing of arbitrary action, [courts] must assume that the agencies have exercised this discretion appropriately" (*Kleppe*, 427 U.S. at 412). See *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98; *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 554-555. As the Seventh Circuit has observed (*Wisconsin*, 745 F.2d at 418 (emphasis in original)):

> an agency cannot have acted arbitrarily or capriciously in deciding not to file a [supplemental environmental impact statement] unless the new information provides a *seriously* different picture of the environmental landscape such that another hard look is necessary.

2. The court of appeals paid little apparent heed to these principles or, indeed, to the decision of the district court. Rather than inquiring whether the agency made a "clear error in judgment," the court essentially assumed the role of a de novo factfinder. The court gave no deference to the Corps' scientific determinations; instead, it engaged in a cursory—and flawed—evaluation of the scientific evidence. The court ultimately overturned the Corps' decision based on an estimation that "some of the proffered information is probably accurate" (Pet. App. 11a) and a mistaken impression that other information "was never considered" (Pet. App. 12a). As Judge Wallace observed in dissent (Pet. App. 21a-28a), the court not only employed the incorrect legal standard, its ensuing conclusions with respect to the *ODFW* and *SCS Reports* are inconsistent with those of the district court, the expert agency, and the agency's independent consultants.

a. The *ODFW Report*, which was part of an extensive study of anadromous fishery resources financed by the Corps, describes the effects of the Lost Creek Dam on downstream fisheries resources. Respondents based their argument that the *ODFW Report* contained significant new information on an internal ODFW memorandum (the *Cramer Memorandum*, see note 4 *supra*) from two ODFW staff biologists to their superior, extrapolating the draft *ODFW Report* results to Elk Creek.[34] The *Cramer Memorandum* suggested, based on the results of the draft *ODFW Report*, that the release of water from the Elk Creek reservoir could increase water temperatures in the Rogue River and thereby decrease survival of newly hatched chinook salmon (Addendum, *infra*, 3a).[35] The *Memorandum* further suggested, based again on informaton in the draft *ODFW Report*, that impoundment and release of that water could lead to an increase in epizootic (population-wide) fish disease (*id.* at 4a-5a).[36] Finally, the *Memorandum* suggested, based on complaints from fishermen, that reservoir water releases from September to October could affect angling on the Rogue River (*id.* at 3a-4a). See also Pet. App. 8a-10a, 47a-48a, 62a-66a.

The Corps evaluated the *Cramer Memorandum* and the *ODFW Report*, using both its own staff and outside experts, and determined that those documents did not present sufficiently reliable new information to justify the preparation of a second supplemental environmental impact statement. The Corps prepared a supplemental information report (the *Elk Creek*

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[34] That staff biologists' internal memorandum does not represent an official position of ODFW or the State of Oregon. See Addendum, *infra*, 9a.

[35] Under this theory, increased winter water temperatures would cause the salmon eggs to hatch early—in February, rather than March or April—when there is a diminished food supply for young fish and when the "fry" are more susceptible to harm from spring flooding. The *Cramer Memorandum* estimated (Addendum, *infra*, 3a) "that an increase of only 1° C in river temperature during January would decrease survival of spring chinook fry by 60-80%."

[36] The *Memorandum* noted (Addendum, *infra*, 4a) that the "release of cool water from Lost Creek Dam has decreased the incidence of disease among spring chinook, but an unprecedented 76% of the fall chinook in 1979 and 32% in 1980 were estimated to have died before spawning."

SIR, see note 4, *supra*) to respond to the concerns raised. First, the Corps questioned the *Cramer Memorandum*'s reliance on the *ODFW Report*'s mathematical model relating temperature inceases to fish mortality. The Corps found that model to be of questionable worth since it had not been validated and did not take into account the Elk Creek Dam's beneficial effects during egg incubation and fry rearing. See Addendum, *infra*, 9a-10a.[37] Furthermore, the Corps' modeling of downstream temperatures, using 1978 through 1979 as validation years, indicated that the Elk Creek Dam would have little effect on water temperatures (*id.* at 10a).[38] The Corps also noted that the Elk Creek Dam's multilevel intake tower, which allows water discharges from different temperature zones within the reservoir, would minimize adverse effects on the fisheries resources (*id.* at 10a, 13a). See also Pet. App. 22a-26a, 46a-49a.

The Corps also found the *Cramer Memorandum*'s predictions of an increase in fish disease to be unreliable. The incidents of increased Lost Creek fish mortality documented in the *ODFW Report* had never been traced to dam construction nor has there been any recurrence of epizootic disease at the location since 1981. See Addendum, *infra*, 10a-11a). See also Cramer Dep. 34-41 (Dec. 4, 1985); A.R. Doc. No. 12 (Critique of Lost Creek Fisheries Evaluation) 2-3. Corps-funded ODFW studies had failed to detect disease-causing organisms in the

[37] The authors of the *ODFW Report* had themselves drawn into question the accuracy of the model by substantially revising the predicted correlation between temperature increases and fish mortality. The *Report* predicted that an increase of 1 degree Celsius in the mean maximum January river temperature would decrease the fry survival rate by 60 to 80 percent. See note 35, *supra*. The authors subsequently concluded that a 1 degree Celsuis temperature increase would decrease the fry survival rate by 30 to 45 percent. See Addendum, *infra*, 9a.

[38] "In most cases, the results indicate that Rogue River temperatures with Elk Creek Dam should be about the same or slightly cooler. The only periods that showed a discernible increase were parts of July, August, and December 1979 which showed a maximum temperature increase of about 0.6° C" (Addendum, *infra*, 10a).

Lost Creek outflow; furthermore, there were no similar epizootic outbreaks following closure of the Applegate Dam (*id.* at 11a). Thus, the Corps concluded that there was no firm evidence to implicate the Elk Creek reservoir as a potential harborer of disease organisms (*ibid.*). See also Pet. App. 22a-26a, 46a-49a.[39]

In reaching these conclusions, the Corps relied not only on the judgment of its own experts, but also on that of two independent experts hired specifically to consider and evaluate the significance of the *ODFW Report*. Both of these consultants criticized the methodology and conclusions of the *ODFW Report*. See Pet. App. 22a-23a.[40] Furthermore, the ODFW

[39] The *Cramer Memorandum's* suggestion that Elk Creek reservoir releases would adversely affect angling during a two-month period apparently was based on complaints from fishermen rather than specific scientific data. See Addendum, *infra*, 4a. The Corps observed that its studies on this matter were inconclusive (*id.* at 11a). The Corps also disagreed with the *Cramer Memorandum*'s suggestion that flow augmentation would dewater spawning redds and noted, in response to the *Memorandum*'s suggestion that salmon runs had decreased, that the 1985 run "was one of the best on record" (*id.* at 11a-12a). The *Cramer Memorandum* made only passing mention of turbidity (*id.* at 4a). The Corps included in its *Elk Creek SIR* a discussion of the effect of timber clearing on turbidity, noting that "[a]lthough there appears [*sic*] to have been higher turbidity values at Elk Creek during the early 1980's as a result of logging, watershed recovery appears to have occurred to reduce turbidity levels back to those of the 1970's when primary studies were conducted" (*id.* at 12a). The Corps further noted that "turbidity levels will to a large extent be controllable through the operational flexibility provided by the dam's multilevel intake tower" (*ibid.*).

[40] The first expert, a professor at the University of Washington School of Fisheries, "filed an extensive and highly critical review" of the *ODFW Report* (Pet. App. 22a). As Judge Wallace explained, the expert found that the *Report* "contained 'considerable statistical inaccuracies, over-extension of statistical methods, and undue biological speculation'; reported that other conclusions of the study, though apparently valid as far as they went, were not statistically significant; disagreed with some of the study's interpretations of causation; questioned the the strength of the study's data and the accuracy of the models it used in reaching its conclusions; dismissed some statements from the report as 'spurious' and others as 'speculation . . . [that was] unfounded'; and accused the authors of the study of throwing out data that did not fit their conclusions" (Pet. App. 22a-23a). See A.R. Doc. No. 112. The second expert, who was less negative in his assessment, stated that the methodology "was

biologists admitted, in depositions and at the hearing in district court, that the report's conclusions were open to question. See Pet. App. 23a-24a, 63a-65a. Thus, the Corps had a sound basis for deciding that the *Cramer Memorandum* and the *ODFW Report* did not present significant new information requiring a supplemental environmental impact statement. The district court correctly concluded that the Corps' decision was reasonable (Pet. App. 47a-49a).

b. The Corps was also justified in concluding that the *SCS Report* did not contain significant new information concerning turbidity. The *SCS Report*—which consisted exclusively of a collection of soil maps (see note 5, *supra*)—was used by respondents in district court to urge that soils in the Elk Creek area have higher sediment-producing capacity than the Corps had estimated and might make a greater contribution to reservoir turbidity owing to the wave action of the impounded water on the reservoir banks. The Corps, however, had already studied turbidity questions in a far more comprehensive and meaningful manner.

As we explained (pages 4-6, *supra*), the Corps completed an exhaustive study on the projected turbidity from Lost Creek and Elk Creek dams—the *1974 Water Quality Report*—and concluded that the Rogue River Project, as a whole, would increase turbidity in specific amounts—from 2 to 3 JTU in average runoff years and from 6 to 9 JTU in high runoff years. The results of the 1974 study were confirmed by a verification study—the *1979 Water Quality Report*—conducted at Lost Creek after that dam was built. In addition, the Corps had considered and addressed the relationship between soil characteristics and turbidity in the *Elk Creek Supplemental Statement*. The Corps explained that soil characteristics do not play a significant role in predicting turbidity; rather, "soil disturbances are the chief contributing factor to turbidity in

'not likely to yield conclusive results' and that the [ODFW's] model was based on 'limited data over only a few years,' which substantially increased the likelihood of 'chance relationships' " (Pet. App. 23a). See A.R. Doc. No. 114.

runoff" (*Elk Creek Supplemental Statement* 115) Thus, the *SCS Report* had limited relevance to actual turbidity levels.[41]

The Corps provided further elaboration on that point in the hearing on respondents' motion for a preliminary injunction. The Corps' engineering geologist explained that the SCS used a "different frame of reference" than the Corps in conducting its study. Tr. 71 (Jan. 16, 1986) (Sturgill testimony). When the SCS conducted its soil survey, it described the soil type and texture. That description provided guidance on the soil's potential, in the abstract, to produce suspended sediment. The Corps, by contrast, approached the question from "an engineering standpoint" and examined whether the soil would actually produce turbidity under the conditions experienced at the reservoir (*id.* at 70-72).[42] The Corp's approach also took into account "management" techniques to reduce turbidity (*id.* at 70). For example, the Corps could reduce the effects of wave action on erosive soils by coating the shore with gravel (see Tr. 57 (Jan. 16, 1986) (Borine testimony)). See Pet. App. 26a-27a; 48a-49a.

When the Corps received the soil maps constituting the *SCS Report*, it reviewed them and concluded that the information—though correct as far as it went—would not change the Corps' turbidity projections.[43] The Corps accordingly concluded that the *SCS Report* did not provide significant new information. The district court correctly held that the Corps' conclusion was reasonable (Pet. App. 48a-49a).

3. The court of appeals' action in this case cannot be squared with this Court's decisions in *Baltimore Gas & Elec. Co.*, *Vermont Yankee Nuclear Power Corp.*, and *Kleppe*, or

[41] The Corps also addressed logging influences on turbidity in the *Elk Creek SIR*, Addendum, *infra*, 12a.

[42] The Corps geologist further testified that Corps specialists had conducted a two-week investigation of the proposed reservoir site in 1979 to investigate erosion potentials and potential for long-term turbidity production (Tr. 72-73 (Jan. 16, 1986)).

[43] Indeed, at the hearing, the author of the *SCS Report* agreed that the "determining factor" for turbidity control at Elk Creek would be "proper management" (Tr. 50 (Jan. 16, 1986) (Borine testimony)).

with the dictates of limited review contained in the APA. As this Court recognized in *Vermont Yankee Nuclear Power Corp.*, a party dissatisfied with the results of an administrative proceeding can always raise a claim that "new information" has been discovered after the administrative record has been closed (435 U.S. at 554-555). If the reviewing court refuses to give substantial deference to the agency's expert judgment on the significance of the new information, there will be few cases in which no plausible basis for requiring additional studies can be asserted in litigation. A Court is not entitled to "substitute its judgment for that of the agency as to the environmental consequences of its actions" (*Kleppe*, 427 U.S. at 410 n.21); it is particularly inappropriate for a court of appeals to do so where, as here, a district court has reviewed the administrative record, heard additional scientific evidence on the environmental significance and probable accuracy of the new information at issue, and has affirmed the expert agency's scientific determination.[44] The court of appeals thus has exceeded its reviewing function under this Court's precedents and, in the process, misjudged the significance of the *ODFW* and *SCS Reports*. This error—which would substantially and needlessly burden the Corps' completion of the Elk Creek Dam—should be corrected by this Court, as should the other errors we have discussed.

[44] Cf. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574-575 (1985) ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

CONCLUSION

The judgment of the court of appeals should be reversed with instructions to remand the case to the agency for further proceedings.[45]

Respectfully submitted.

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SEPTEMBER 1988

[45] On remand, the agency would be obligated to prepare a supplemental statement providing further elaboration on the subject of cumulative impacts. See note 6, *supra*.

ADDENDUM A

CEQ REGULATIONS INVOLVED

I.

The Council on Environmental Quality's present regulation governing incomplete or unavailable information provides (40 C.F.R. 1502.22):

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is

supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

II.

The Council on Environmental Quality's rescinded regulation governing incomplete or unavailable information (the "worst case" regulation) provided (40 C.F.R. 1502.22 (1985)):

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

ADDENDUM B

[Cramer Memorandum]

Date: February 21, 1985
To: Harry Wagner
From: Steve Cramer and Mick Jennings
Subject: Elk Creek Dam

Harry, we want to describe some concerns we have regarding the possible effects of Elk Creek Dam on the fish resources of the Rogue River. It now appears that Elk Creek Dam will be constructed. Since the time that our commission adopted a neutral stand on Elk Creek Dam, our evaluation of Lost Creek Dam has given us new insight into the possible effects of Elk Creek Dam on salmonids downstream. Nearly all the effects would appear to negatively impact the resource. Our commission may wish to consider this new information and determine if our agency should continue to remain neutral. Our key concerns and new information are listed below.

1. Elk Creek Dam is likely to increase water temperatures downstream during fall and early winter. This influence will probably extend into the Rogue where spawning of spring chinook is highly concentrated. We have found that warming of the Rogue River by Lost Creek Dam during October-January has caused early emergence and reduced survival of spring chinook fry. We estimated that an increase of only 1°C in river temperature during January would decrease survival of spring chinook from by 60-80%. We believe that the potential influence of Elk Creek Dam on temperatures in Elk Creek and in the Rogue River during October-January should be thoroughly evaluated before ODFW sets its final position on this project.

2. The simplied rule curve that appears in supplement 1 of the Elk Creek Lake EIS indicates that flow in Elk Creek will be augmented during September-October. Augmentation of

flow by Lost Creek and Applegate dams during September-October has already caused two problems. First, increased flows have decreased angling opportunities in the Rogue canyon. Anglers and guides have complained that high flows have "washed out" many of their favorite fishing riffles and that fly angling is no longer effective in most areas because the water is too deep and swift. Guides have become especially vocal with these complaints. Second, increased flows during September and October cause spring chinook to spawn higher on the gravel bars and this increases the chances that redds will be dewatered when flows are reduced as the dams fill during February-April. Several redds in the upper Rogue were temporarily dewatered during February 1985 when outflows from Lost Creek Dam were low.

If the Corps agrees to draw down Elk Creek Lake by Labor Day, as we have recommended for Lost Creek Dam, then we need to know what the quality of water released in late summer will be. We are concerned that the need to release more water during July and August may result in release of highly turbid water in August or September.

3. Impoundment of water behind Elk Creek Dam may increase the incidence of fish diseases in the Rogue River. We have found that release of cool water from Lost Creek Dam has decreased the incidence of disease among spring chinook, but an unprecedented 76% of the fall chinook in 1979 and 32% in 1980 were estimated to have died before spawning. We have not determined the actual cause of the epizootics in 1979 and 1980, but we suspect that Lost Creek Dam contributed to them because no such mortality of fall chinook had been documented previously. We have found that prespawning mortality of spring chinook is positively correlated to river temperature and that prespawning mortality of fall chinook is negatively correlated to flow. Yet, we have found that these relationships, which were developed entirely from data gathered after dam closure, indicate that massive mortalities of spring and fall chinook would have occurred in almost every year under pre-impoundment temperatures and flows. Substantial mortality rarely occurred. Thus, it appears that the potential for disease outbreaks has increased since dam closure, and that the river must now be higher and cooler than before dam closure to prevent epizootics.

4. If Elk Creek Dam is to be constructed, ODFW needs to have an advance agreement with the Corps that our concerns will be evaluated and that a mechanism will be available for implementing our recommendations. We have found that the Corps is highly reluctant to modify their rule curves for operation of Lost Creek and Applegate dams. This has made it difficult to resolve concern #2. We should not repeat this problem with Elk Creek Dam.

Harry, the spring chinook runs on the Rogue are at an all-time low point. Anglers are becoming increasingly frustrated and upset about low runs, shortened seasons and smaller bag limits. They are also becoming more vocal. We feel the agency stands to lose much of its credibility if we continue to support Elk Creek Dam after knowing what has occurred to the adult spring chinook returns following completion of Lost Creek Dam. The Commission should be made aware of this new information and the possible consequences if they continue to hold to the middle of the road.

Table 1 depicts the counts of spring chinook over Gold Ray Dam between 1942-1984. Note that post-impoundment juveniles showed up in the 1981-1984 adult returns.

cc: C. Smith
R. Riikula
M. Wyland
R. Rousseau
McPherson
E. Wagner
Satterthwaite
Fustish

Table 1

Estimated escapement[a] of spring chinook into the upper Rogue, 1942-1984.

1942	41779	1964	37327
1943	36136	1965	47644
1944	30632	1966	31422
1945	31996	1967	14693
1946	28374	1968	22066
1947	33637	1969	59043
1948	26979	1970	45101
1949	18810	1971	29473
1950	15530	1972	30788
1951	19443	1973	35276
1952	15888	1974	16747
1953	31465	1975	21483
1954	24704	1976	21570
1955	15714	1977	16403
1956	28068	1978	47221
1957	17710	1979	38207
1958	15016	1980	36932
1959	13972	1981	17213
1960	24374	1982	29924
1961	31775	1983	12511
1962	31395	1984	12549
1963	40567		

[a] April 1-August 15 count at Gold Ray Dam (km 202).

ADDENDUM C

SUPPLEMENTAL INFORMATION REPORT NO. 2
ELK CREEK LAKE
ROGUE RIVER BASIN, OREGON

Introduction

The Elk Creek Lake project is located in Jackson County, Oregon, on Elk Creek 1.7 miles above its confluence with the Rogue River. The environmental effects of this project have been addressed in the following documents which are incorporated herein by reference.

1) A Final Environmental Impact Statement (EIS), filed with the Council on Environmental Quality on 17 September 1971;

2) A Final EIS Supplement (EISS) filed with the Environmental Protection Agency on 24 December 1980;

3) A Record of Decision signed by the North Pacific Division Engineer, 19 February 1982;

4) An Environmental Assessment (EA) and Findings of No Significant Impact (FONSI), addressing project design changes, signed by the Portland District Engineer on 11 October 1983; and

5) A Clean Water Act Section 404 Evaluation signed by the Portland District Engineer 11 October 1983.

Recent claims by the Oregon Natural Resources Council (ONRC) and others have stated that the Corps should prepare another Supplemental EIS because there is "significant new information" relevant to environmental concerns and bearing on the Elk Creek Lake Project. While it is clear based upon our review that this information does not require additional NEPA documentation, Corps regulations provide that a Supplemental Information Report can be used to disseminate information on points of concern regarding environmental impacts set forth in the EIS. The purpose of this report is to provide supplementary information on points of concern raised by public and private organizations since completion of the Final EIS Supplement.

Wildlife

One concern is that wildlife impacts associated with Elk Creek were not adequately addressed in the EIS Supplement because the irrigation project with its associated wildlife benefits may not proceed and a wildlife mitigation plan has not been developed.

Both of these issues were addressed in the Final Environmental Impact Statement Supplement (EISS) for Elk Creek Lake. The EISS recognized that wildlife benefits for Elk Creek Lake were related to the irrigation project and may not be realized. The EISS stated, "For the 'Without Irrigation Diversion' category, no wildlife benefits have been assigned." The EISS also recognized the need for the development of a wildlife mitigation plan. Because a wildlife mitigation plan has not yet been developed, the EISS assumed the maximum level of adverse effects to wildlife. Implementation of a mitigation plan will lessen the extent of wildlife impacts.

Planning for wildlife mitigation at Elk Creek project is in progress, with an interdisciplinary team consisting of representatives from the Corps of Engineers, U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife, and Bureau of Land Management. Field work will be conducted in January 1986 to measure habitat variables for each of eight target species. Habitat Evaluation Procedures (HEP) will be completed by 1 February 1986, with the Wildlife Mitigation Plan completed in April 1986. The Corps has budgeted $350,000 for this Wildlife Mitigation Plan which will be implemented, subject to the availability of construction funds, in February 1987.

Fisheries

The Corps of Engineers entered into contract with Oregon Department of Fish and Wildlife in 1974 to evaluate the effect of the Rogue River Basin projects on anadromous fisheries resources—The Rogue Fisheries Evaluation Program. The studies have continued to the present time with approximately four million dollars expended to date. As reported to Congress, the purpose of these investigations is to determine the effect of the Rogue projects on fisheries resource and to determine the

mechanisms influencing fish production. This information is necessary to "fine tune" the Rogue River basin projects to maximize fisheries enhancement benefits consistent with other project purposes. To date, Applegate and Lost Creek projects are being evaluated, and the Corps is now reviewing a proposal from ODFW for pre-impoundment studies related to Elk Creek as part of the Rogue River Basin Fisheries Evaluation Program.

Fisheries-related concerns expressed by ONRC and others are based upon information contained in a report under the above-referenced contract, the Lost Creek Phase I Report dated August 1985, and an internal ODFW memorandum dated 21 February 1985. The report is the result of studies done in pre- and post impoundment years 1974-81 on the effects of Lost Creek Dam on downstream anadromous fish and angling in the Rogue River. It is currently under review by the Corps and outside consultants. The memorandum, by ODFW staff biologists, discusses specific concerns regarding possible effects of Elk Creek Dam. (It should be noted that this memorandum does not represent the official position of ODFW or the State of Oregon on the Elk Creek Lake Project.)

The concerns expressed by ONRC and others relate to several elements in a complex array of factors affecting Rogue River anadromous fisheries as follows:

1) A fall or winter warming of the river by heat stored in a reservoir may cause early emergence of spring chinook fry from the gravel. This could expose the fry to a wintertime lack of food and the possibility of being swept out of optimal rearing habitat. The mathematical modelling in the Lost Creek Phase I Report predicts a decreased survival of 60-80 percent of a 1° C rise in mean maximum January river temperatures. However, this effect has been subsequently recalculated by ODFW to 30-45 percent for the same temperature increase. These estimates do not take into account the beneficial effect provided by the dams of reducing peak floodflows during egg incubation and fry rearing, even though this beneficial effect was recognized in the Phase I Report. The reduction in peak floodflows can partially or fully

offset the negative effects of temperature increases on fry survival. Further, the model has yet to be validated, so that while the biological reasoning is sound and has been recognized for some time, the predictive capability of the model is uncertain. Comments generated by internal Corps review, outside consultants, and ODFW indicate that the model and its conclusions can not yet be treated with reliability.

The Corps' Waterways Experiment Station in Vicksburg, Mississippi, has modelled downstream temperatures as a result of Elk Creek Dam, using 1978-79 as validation years. In most cases, the results indicate that Rogue River temperatures with Elk Creek Dam should be about the same or slightly cooler. The only periods that showed a discernible increase were parts of July, August, and December 1979 which showed a maximum temperature increase of about 0.6° C. The effects of this temperature increase on spring chinook fry will be offset by the reduction in peak winter flows and further mitigated by the ability of the intake tower to regulate outflow temperatures. This latter point is supported in an experiment conducted by ODFW in conjunction with the Corps. In 1984 the Corps operated Lost Creek Dam to reduce outflow temperatures from the dam. The results of this experiment were summarized in an August 1985 letter from ODFW. That letter stated, "The experimental reduction in outflow temperatures last October and November, in conjunction with other factors, appears to have improved survival to the fry stage. We had the lowest number on record of wild fish spawning, yet this spring we had the second highest abundance of spring chinook fry on record." These findings support the summary in the EISS on the effects of the Elk Creek project on Rogue River temperatures and the conclusion that the operation of the multilevel intake tower would minimize adverse effects on the fish resources.

2) Unusual prespawning mortality of fall chinook after impoundment of Lost Creek Lake has been thought to be the result of certain disease organisms found in dead and dying fish. ODFW biologists are concerned that Lost Creek Dam may be

related to these outbreaks. A study was performed with Corps funding that investigated these epizootics. The organisms were not detected in Lost Creek Lake outflow; there were no similar high outbreaks of prespawning mortality in the Applegate River following closure of Applegate Dam; and there had been occurrences of spring chinook prespawning mortality in the Rogue prior to closure of Lost Creek Dam. The fact that the fall chinook mortalities occurred after Lost Creek impoundment is not firm enough evidence to implicate Elk Creek Lake as a potential harbor of disease organisms. If anything, the dams can control what might be greater pre-spawning mortality since lower flows and higher temperatures in summer are believed to aggravate the disease problem and Lost Creek provided higher flows and lower temperatures during that period. Elk Creek has the potential to provide the same benefits.

3) Flow augmentation from drawdown operations of Lost Creek Lake has approximately doubled natural Rogue River flows in the late summer and early fall. This has prompted some complaints from anglers and guides of reduced ability to fish. Rogue River fisheries studies on this question are inconclusive. Based upon a typical release schedule, Elk Creek would increase water surface elevations at Agness by approximately 2-1/2 inches during the same period. Unavoidable adverse effects to fishing during these periods were recognized in the EISS because of dam operations, although not specifically identified to increased flow.

Another concern attributed to flow augmentation is the potential for dewatering of spring chinook salmon spawning redds. This would result from salmon spawning on gravel bars early in the fall which are later dewatered when drawdown operations are complete. However, ODFW has stated that they have not identified any significant mortality due to dewatered redds which they have observed. Such dewatering would be temporary due to flow fluctuations. There are also mitigating factors such as cool temperatures, rain, and subgravel flow which aid survival of eggs and preemergent fry. In addition, redd dewatering can be minimized through control of dam outflows.

4) Another concern relates to the size of spring chinook runs after Lost Creek Dam closure in 1977. With two exceptions, run sizes have been within the normal range. Run sizes in 1983 and 1984 were low. These runs may have been a result of poor ocean conditions, namely the El Nino phenomenon in which upwelling from the deep ocean ceases. The resulting scarcity of nutrients, combined with warm surface temperatures are believed to impair salmon growth and survival. The 1985 run was one of the best on record.

Turbidity

Concern has been expressed that the extensive timber clearing which has occurred in recent years on private lands in the Elk Creek watershed will increase potential sediment yields to the reservoir, causing long-term turbidity problems both in the reservoir and downstream. Turbidity is a factor in the ability of juvenile fish to feed, and the fishability of angling gear, as well as production of invertebrates which serve as food for juvenile anadromous fish. Effects of Elk Creek Lake operations on downstream turbidity were addressed in the 1980 EISS with the conclusion that there would be no significant effects on fish production.

A review of turbidity data collected by the U.S. Geological Survey between 1974 and 1985 at Elk Creek indicates the average daily turbidity levels in the 1980's are generally as low as those of the 1970's. Although there appear[] to have been higher turbidity values at Elk Creek during the early 1980's as a result of logging, watershed recovery appears to have occurred to reduce the turbidity levels back to those of the 1970's when primary studies were conducted.

In addition, and as discussed below, turbidity levels will to a large extent be controllable through the operational flexibility provided by the dam's multilevel intake tower. As a result, the turbidity effects are not expected to differ from those described in the 1980 EISS.

Project Flexibility

As indicated in the EIS Supplement, the project includes a multilevel intake tower which provides the capability to control flow, temperature, and turbidity. As presently designed, the Rogue Basin Projects, including the Elk Creek Project, will be operated in accordance with rule curves designed to benefit project purposes as set forth in the authorizing documents. In Design Memorandum No. 10, Supp. 2, an additional release elevation was added to insure greater flexibility in meeting temperature ranges resulting from the Rogue River Fishery Evaluation Studies. A second benefit would be operational flexibility to reduce turbidity levels released from the project. The Elk Creek project also has the capability to operate with little effect on temperature or flow except for storm events. Pre- and post-impoundment studies conducted to date and to be conducted will evaluate the effects of the projects. Should results from these continuing studies necessitate significant changes in project operation in order to benefit project purposes, appropriate environmental documentation would be prepared in accordance with NEPA.

/s/ Gary R. Lord

Date: 10 January 1986

GARY R. LORD
Colonel, Corps of Engineers
District Engineer

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RESPONDENT'S

BRIEF

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In The

Supreme Court of the United States

October Term, 1988

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY, *et al.*,

Petitioners,

v.

OREGON NATURAL RESOURCES COUNCIL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act requires disclosure and analysis of mitigation measures where an agency represents that mitigation will diminish adverse environmental consequences and relies upon such mitigation in deciding to proceed with a proposed action?

2. Whether the National Environmental Policy Act requires an analysis of worst case possibilities?

3. Whether significant new information relevant to environmental concerns and bearing on the Elk Creek Dam and its impacts required the Army Corps of Engineers to prepare a supplemental environmental impact statement?

PARTIES TO THE PROCEEDING

Respondents accept petitioners' description of the parties to the proceeding. Each of the respondents is an Oregon non-profit, non-publicly traded corporation. None of the respondents has any parent companies, subsidiaries, or affiliates. This statement is provided pursuant to Supreme Court Rule 28.1.

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STATUTES AND REGULATIONS INVOLVED

With the addition of two regulations of the Council on Environmental Quality (hereinafter "CEQ"), reproduced in pertinent part in the Addendum, respondents accept petitioners' recitation of the statutory provisions and regulations involved.

STATEMENT

With the following additions, qualifications, and corrections, respondents accept petitioners' statement of the case, as supplemented by the facts in the opinion of the court of appeals:

1. Seventy-six percent of the benefits attributed to the Elk Creek Dam have been questioned by the General Accounting Office of the United States (hereinafter "GAO"). Comptroller General of the United States, *Corps Of Engineers Should Reevaluate The Elk Creek Project's Benefits and Costs*, (Mar. 15, 1982) (hereinafter *GAO Report*), District Court Doc. No. 21, A.R. Doc. No. 12, at ii-iv, 8-10. The benefits questioned include those claimed for the project's flood control, water supply, irrigation, and recreation features. *GAO Report* ii-iii, 10-11, 14-16, 24, 29-33. The project might enhance fish to some degree, but at best will only compensate for the dam's adverse impacts on other existing fish and wildlife resources. *Elk Creek Lake Environmental Impact Statement* Supp. No. 1 (Dec. 1980) (hereinafter *Elk Creek Supplemental Statement*), District Court Doc. No. 21, A.R. Doc. No. 7, at 5-6, 69-70 (Comments and Responses 6-17 and 6-18).

Even the Army Corps of Engineers (hereinafter the "Corps") has admitted that the Elk Creek Dam, considered on its own merits, will return only sixty-three cents of benefits for every dollar spent. *GAO Report* 14.

The Elk Creek Dam would displace and, without mitigation, eliminate wildlife populations dependent on the habitat that would be flooded. *Elk Creek Supplemental Statement* 38, 46. Moreover, the dam would eliminate self-sustaining populations of summer steelhead, winter steelhead, and coho salmon upstream of the dam; and increase turbidity downstream in the Rogue River, depressing salmon and steelhead populations. *Elk Creek Supplemental Statement* 46. When the Corps concluded that the costs of the Elk Creek Dam were outweighed by the economic benefits, the cost of wildlife mitigation was unknown because the wildlife compensation plan had not been developed yet. Plaintiffs' Amended Witness Statement, District Court Doc. No. 37, at 2.[1]

2. The Rogue River is one of the eight rivers in the nation that was given immediate recognition and protection as a wild and scenic river in 1968, due largely to its outstanding fishing qualities. Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1274(a)(5); H.R. Rep. No. 1623, 90th Cong., 2d Sess. 1 (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3801, 3803, 3805; Conf. Rep. No. 1917, 90th Cong., 2d Sess. 1 (1968), *reprinted in* [1968] U.S.

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[1]Plaintiffs' Amended Witness Statement was adopted by Mr. Garst of the U. S. Fish & Wildlife Service and made an exhibit during the hearing on plaintiffs' motion for a preliminary injunction. Transcript of January 16, 1986, Hearing on Motion for Preliminary Injunction, District Court Doc. No. 45, at 22-23, 26 (Garst testimony).

Code Cong. & Ad. News 3852. The Rogue "is the most productive and valuable salmon and steelhead stream within the State of Oregon." *Elk Creek Supplemental Statement* 135 (Comment 32-2). Estimates of the annual value of the sport and commercial fishery of the Rogue River range from $18 million to $25 million. *GAO Report* 34.

3. The Elk Creek Dam was designed "to be operated in conjunction with the Lost Creek Dam." Petitioners' Brief (hereinafter "Pet. Br.") 3. The Corps has concluded, however, that the Lost Creek Dam alone "could adequately serve the functions of water supply, irrigation, fishery enhancement, and recreation." *GAO Report* 32.

4. Petitioners' allegation that the temperature, turbidity, and volume of water released from the Elk Creek Dam can be controlled with a multiport structure, Pet. Br. 3, is unproved. The flexibility of the multiport structure has been questioned by the National Marine Fisheries Service (hereinafter "NMFS"), because of "the higher water temperatures and turbidities that would be expected in Elk Creek as compared to Lost Creek." Letter from Dale R. Evans to Colonel Terence Connell (Jan. 15, 1981) (hereinafter *Evans Letter*), District Court Doc. No. 21, A.R. Doc. No. 8d, at 3-4 (Comment 32-8).

5. Turbidity was a major focus of the *Elk Creek Supplemental Statement* not only because "high turbidity levels impair flyfishing," Pet. Br. 4, but because they also adversely affect fish behavior, survival, and production. *See Elk Creek Supplemental Statement* 21, 36-37.

Petitioners admit that the Elk Creek Dam would prolong the duration of turbid flows in the Rogue River following periods of high runoff, but claim the dam would re-

duce the level of turbidity. Pet. Br. 5. The Corps, however, stated that operation of the dam would *increase* the magnitude of turbidity in the Rogue immediately or soon after a storm. *Elk Creek Supplemental Statement* 36, 84 (Responses to Comments 14-16 and 14-20).

Petitioners' account of the Corps' 1974 report on water temperature and turbidity is misleading. The computer simulations used to project turbidity were generated by the WESTEX mathematical model. *Rogue River Basin Water Temperature and Turbidity* (hereinafter *1974 Water Quality Report*), District Court Doc. No. 21, A.R. Doc. No. 4, at Vol. I 46. The WESTEX model has been rejected by the U.S. Environmental Protection Agency (hereinafter "EPA"), and has been criticized by an independent expert in civil engineering for a number of reasons. *Elk Creek Supplemental Statement* 126 (Comment 29-1), 127 (Comment 29-4 and Response), 155 (Comments 39-4 and 39-8), 162 (Response to Comment 39-8), 164 (Comment 39A-1).[2]

As for the conclusions of the *1974 Water Quality Report* quoted in the *Elk Creek Supplemental Statement*, they relate only to the effect of the Rogue River Basin Project on turbidity in the Rogue River during the summer. *Elk Creek Supplemental Statement* 33. Elsewhere, the Corps conceded that in some high flow years prolonged turbidities greater than 20 JTU would occur during the

[2]The criticisms include the failure adequately to document key assumptions supporting the model, *id.* at 126 (Comment 29-1), and the one-dimensional nature of the model—for example, the model does not account for wave action or unstable soils. *Id.* at 127 (Comment 29-4 and Response), 155 (Comment 39-8), 162 (Response to Comment 39-8).

winter. *Id.* at 68 (Comment 6-9), 70 (Response to Comment 6-9). In addition, the reported 6 to 9 JTU increase during high runoff years only represents average monthly values. *Id.* at 111 (Response to Comment 21-32). Unfortunately, average values of turbidity are not very instructive. *Id.* at 133 (Comments 31-1 and 31-2). More revealing, but not disclosed by the Corps, are turbidity peaks and their duration. *Id.*

Finally, the conclusions of the *1974 Water Quality Report* only reflect the results of one possible plan of operation for the 1972 study year ("Plan C"). *Compare 1974 Water Quality Report* Vol. I 50 with the same report at Table 33; see also page 20 and Table 17. The *1974 Water Quality Report* makes no mention of what would occur under an equally viable plan ("Plan B").[3] Under Plan B, the Rogue River Basin Project would increase turbidity in the Rogue River below Lost Creek and Elk Creek Dams from 6 to 39 JTU in the summer, to a maximum turbidity of 42 JTU, and from 7 to 22 JTU in the fall, to a maximum of 29 JTU. *1974 Water Qaulity Report* Vol. I Table 32.

Evaluating the 1974 report as a whole, the NMFS concluded "that the Elk Creek project would have significant adverse impact [sic] on fish production and angling in the Rogue River." *Elk Creek Supplemental Statement* 135 (Comment No. 32-3). On the basis of the *1974 Water*

[3]Under both Plan B and Plan C, discharges from the Lost Creek and Elk Creek Dams during the winter would come from the lowest possible elevation of the multiport structure. *1974 Water Quality Report* Vol. I Table 17. In reality, the Corps will not release water from the deepest part of Elk Creek Lake during the winter. *See Elk Creek Supplemental Statement* 139 (Response to Comment 32-8).

Quality Report's Plan C, the Oregon Department of Fish and Wildlife (hereinafter "ODFW") concluded that the turbidity of the Rogue River below Elk Creek might "reduce fly fishing and impair the aesthetic and recreational values of the river." *Id.* at 66. Thus, the Corps' 1979 study, which in the Corps' view "reinforced the conclusions of the 1974 Water Temperature and Turbidity Report," *id.* at 34, also reinforced the NMFS' and ODFW's conclusions about the adverse impacts of the Elk Creek Dam on fish and fishing in the Rogue River. *See Evans Letter* 2-3 (Comment 32-3).

The Oregon Water Resources Department, ODFW, and NMFS all severely criticized the *Elk Creek Lake Water Quality Update Study* (hereinafter *1979 Water Quality Report*) for using 1977 data to predict the effects of the Elk Creek Dam, because 1977 was a drought year, characterized by the lowest runoff on record. *Elk Creek Supplemental Statement* 62 (Comment 4-1), 68 (Comment 6-7), 135-138 (Comments 32-1, 32-15, 32-16, 32-28). As a result, said the NMFS, "the data from 1977 d[id] not provide any indication of turbidity potential during an average, high, or normal low water year." *Id.* at 137 (Comment 32-15). The EPA agreed, commenting that there was insufficient information in the *1979 Water Quality Report* to support the Corps' conclusions about water quality impacts. *Id.* at 135 (Comment 39-1). Consequently, the EPA charged that the report failed

> to resolve the critical water quality issue of this project. How much additional turbidity will Elk Creek Lake contribute to the Rogue River and at what time of the year?

Id. at 153. The EPA rated the *Elk Creek Supplemental Statement* "EU-2," Environmentally Unsatisfactory, Insufficient Information. *Elk Creek Supplemental Statement* 153. The NMFS called it inadequate. *Evans Letter* 4 (Comment 32-16).

Petitioners claim that the Elk Creek Dam would have only minor effects on fish production. Pet. Br. 6. The Corps' conclusion about minor effects was applicable only to conditions during normal years, however. *Elk Creek Supplemental Statement* 37. The Corps also admitted that during years of high flow, prolonged turbidity levels of greater than 20 JTU during the winter "could have significant effect [sic] on both the fishery and fish production." *Id.* at 68 (Comment 6-9), 70 (Response to Comment 6-9).

Even the statements about the Elk Creek Dam's minor effects in normal years were challenged by expert agencies. *See id.* at 135 (Comment 32-1), 137 (Comments 32-24, 25, and 26). According to the NMFS, release of waters from the dam would exceed state water quality standards "on a frequent and long-term basis."[4] *Id.* at 137 (Comment 32-27). The NMFS and ODFW, respectively, characterized the conclusion that average annual turbidity would be unaffected by the Elk Creek Dam as a "misrepresentation" and possibly "misleading." *Id.* at 68 (Comment 6-13), 137 (Comment 32-21). Downstream turbidity

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[4]The Corps' position that the state's water quality standards do not apply to water released from a dam, *Elk Creek Supplemental Statement* 139 (Response to Comment 32-27), does not alter the fact that water released from the Elk Creek Dam will exceed those standards.

would be reduced during periods of high runoff (although such reductions would be of small biological value), but "during periods when the Rogue is clearer, outflows from an Elk Creek reservoir would increase Rogue turbidity, adversely impacting productivity and public angling benefits." *Id.* at 137 (Comment 32-21). Petitioners state that the most significant effect of the Elk Creek Dam on fish is mitigated by the Cole M. Rivers Fish Hatchery. Pet. Br. 6. The hatchery will not mitigate the impacts of increased turbidity on fish production or angling, however. *Evans Letter* 3 (Comment 32-5).

6. The Elk Creek Dam would adversely affect populations of mountain lion, black bear, gray fox, bobcat, river otter, beaver, osprey, eagles, and many other species in addition to deer, elk, and game bird populations. *Elk Creek Supplemental Statement* 26-27, 38. Petitioners' candid disclosure to this Court that "some species would be adversely affected by the project," "even with adoption of mitigation techniques," Pet. Br. 24, were not revealed in the *Elk Creek Supplemental Statement*, which explicitly stated that mitigation measures would "compensate" for and "offset" the adverse impacts of the project on all wildlife. *Elk Creek Supplemental Statement* 6, 38, 86 (Comments 15-1, 4, and 5 and Responses).

7. The Corps issued the Supplemental Information Report (hereinafter *Elk Creek SIR*) on January 10, 1986 —after, and as a result of, the action brought by respondents. *See* Letter from Gary R. Lord to Russell D. Peterson (Jan. 10, 1986), District Court Doc. No. 40, A.R. Doc. No. 106, at 2. The *Elk Creek SIR* did not explain why new information provided to the Corps by the Soil Conservation Service (hereinafter "SCS") was not significant, nor did it address the SCS's information. *See* Pet. Br. 12a.

SUMMARY OF ARGUMENT

1. The court of appeals properly held that the Corps was obligated to specify and analyze the effectiveness of mitigation measures, because the Corps voluntarily chose to mitigate the adverse impacts of the Elk Creek Dam on wildlife and relied upon mitigation in describing the environmental consequences of proceeding with the project. The court did not create a substantive duty of mitigation, or hold that a "complete mitigation plan" is required in every circumstance. The court merely applied the CEQ regulation mandating a discussion of mitigation measures to the circumstances of this case. 40 C.F.R. § 1502.16(h). The court's holding will ensure a fully informed and well-considered decision.

2. The court of appeals properly found that the Corps did not fully disclose the worst case impacts of its proposal. The National Environmental Policy Act of 1969 (hereinafter "NEPA"), 42 U.S.C. § 4321 *et seq.*, requires disclosure of the full range of possible adverse impacts, including worst case impacts. The CEQ's revision of 40 C.F.R. § 1502.22 did not excuse agencies from discussing low probability/high consequence events, nor did it overturn judicial precedents construing NEPA as requiring a worst case analysis. The court did not dictate the methods the Corps must follow in preparing a worst case analysis, but merely ordered the disclosure of worst

case possibilities. Petitioners complain that courts have acted unreasonably in applying the worst case requirement, but fail to mention that only one court has held a worst case analysis to be inadequate, while a number of courts have found worst case analyses to be adequate.

3. The court of appeals applied the correct standard of review in ruling that the Corps' decision not to prepare a supplemental environmental impact statement (hereinafter "EIS") was unreasonable. Whether new information is "significant" enough to require the preparation of a supplement is a legal question, and courts should therefore determine whether an agency's decision was "in accordance with law" under 5 U.S.C. § 706(2)(A) or adopted "without observance of procedure required by law" under 5 U.S.C. § 706(2)(D). The court of appeals was not required to defer to the Corps regarding the legal obligations engendered by the facts in this case.

New information generated by expert agencies was significant because it raised new environmental concerns, and exposed radically different dimensions to existing environmental concerns about the impact of the Elk Creek Dam on the fishery of the Rogue River. The court of appeals therefore correctly held that the Corps' decision not to prepare a supplemental EIS was unreasonable.

ARGUMENT

I. NEPA REQUIRES DISCLOSURE AND ANALYSIS OF MITIGATION MEASURES AND WORST CASE POSSIBILITIES UNDER THE CIRCUMSTANCES OF THIS CASE.

Courts must ensure that federal agencies take a hard look at the environmental consequences of their actions. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983); *see Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). To provide that assurance, a reviewing court must satisfy itself that an agency has observed the procedure required by NEPA. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 n. 21 (1978); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417 (1971); Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. § 706(2)(D). If the agency fails to comply with NEPA's procedural requirements, its decision should be set aside. *See Vermont Yankee*, 435 U.S. at 558.

Only the final, substantive decision whether to proceed with a proposed action is left to an agency's discretion, so long as that decision is neither arbitrary nor capricious. *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98; *Kleppe*, 427 U.S. at 410 n. 21; *Citizens to Preserve Overton Park*, 401 U.S. at 416; APA, 5 U.S.C. § 706(2)(A). The court of appeals here strictly observed these precepts.

A. NEPA Requires Agencies Relying Upon Mitigation To Specify And Analyze The Measures They Propose To Use.

Petitioners portray the court of appeals' decision as one imposing a substantive duty of mitigation upon federal

agencies. But the court of appeals did not hold that federal agencies are *required* to mitigate for environmental harm. The court's holding in this case was that the Corps' discussion of mitigation failed to provide the decisionmaker with the information necessary to make an informed decision.

1. The Court Of Appeals Did Not Create A Substantive Duty Of Mitigation.

Petitioners significantly overstate the court's actual holding on mitigation by claiming the court imposed a substantive duty of mitigation, requiring all EIS's to contain, in petitioners' words: "demonstrably effective plans for mitigating environmental harm." Pet. Br. 14. No such language appears in the opinion of the court of appeals. Furthermore, the facts clearly establish that the court did not *require* mitigation.[5]

The Corps, not the court, decided to mitigate the adverse impacts of the project on wildlife. According to the Corps, the impacts of filling Elk Creek Lake would affect far more species than just deer, elk, and certain game birds. Without mitigation, "all . . . species of mammals would experience population reductions," as would predatory bird species, reptiles, and amphibians. *Elk Creek Supplemental Statement* 38. Upwards of thirty listed species inhabiting the area would be impacted, including mountain

[5]Petitioners make far too much of the court's comment that significant measures must be undertaken to mitigate the adverse effects of a proposed action. See Pet. App. 5a. That comment was mere dictum, because the court invalidated the *Elk Creek Supplemental Statement* on procedural, not substantive, grounds.

lion, black bear, gray fox, bobcat, mink, river otter, beaver, goshawk, osprey, owls, and eagles.

The Corps committed itself to developing what it called a "compensation plan" for these wildlife species. *Elk Creek Supplemental Statement* 6. "The compensation," the Corps explained, "would be accomplished by managing selected lands to increase the quality of habitat and therefore its carrying capacity for wildlife." *Id.* Increasing the carrying capacity of surrounding habitat was expected to lead to the support of wildlife displaced from lands flooded by the Elk Creek Dam. *Id.* at 86 (Response to Comment 15-1); *see id.* at 38.

Even though the Corps had yet to develop or decide upon specific mitigation measures, *id.* at 6, much less analyze their effectiveness, the agency asserted that its plan would "compensate for the loss of [wildlife] habitat, and . . . adequately offset the adverse impacts." *Id.* at 86 (Response to Comment 15-4). Based on this unsupported assertion, the Corps concluded that the benefits of the Elk Creek Dam outweighed the economic and environmental costs of the project. *Record of Decision,* Appendix to Petition for Writ of Certiorari (hereinafter "Pet. App."), at 58a. Consequently, the Corps issued a Record of Decision pursuant to 40 C.F.R. § 1505.2, announcing its intention to proceed with the project. *Id.* at 53a-58a.

Under these circumstances, where the Corps represented that there would be no adverse environmental consequences for wildlife, the agency was obliged to do more

than merely promise to develop a compensation plan sometime in the future. It had to make a realistic assessment of the efficacy of specific mitigation measures, before proceeding with construction and operation of the Elk Creek Dam. Without such an assessment, the Corps could not conclude that it could achieve compensation, or that there would be no reduction in wildlife populations.

In other words, without a "complete mitigation plan," the *Elk Creek Supplemental Statement* was not the detailed statement NEPA requires. It was not "a detailed statement on . . . the environmental impact of [a] proposed action," 42 U.S.C. § 4332(C), because it could not result in the "fully informed and well-considered decision," *Vermont Yankee*, 435 U.S. at 558, that is NEPA's aim. The consequences of the proposal could not be known in advance, as they must be under NEPA, *before* the commitment of resources. *Baltimore Gas & Elec. Co.* 462 U.S. at 97; *see also* 40 C.F.R. § 1502.2(f) ("Agencies shall not commit resources prejudicing selection of alternatives before making a final decision."). An agency may not "act now and deal with the environmental consequences later." *Foundation for North Am. Wild Sheep v. U.S., Etc.*, 681 F.2d 1172, 1181 (9th Cir. 1982). Accordingly, the court of appeals required the Corps to analyze the effectiveness of specific mitigation measures. Only such an analysis will enable both the decisionmaker and the public to understand and be assured of the actual consequences of the project *before* the Corps proceeds with it.

2. The Court Of Appeals Properly Construed The Existing Duty To Discuss Mitigation Measures.

The court of appeals' holding required adequate consideration and full disclosure of the Corps' own compensation plan—a standard NEPA procedural duty. 40 C.F.R. § 1502.16(h). In the court's words: there must be a discussion "analyz[ing] the mitigation measures in detail and explain[ing] the effectiveness of the measures." Pet. App. 5a. In the absence of such a discussion, neither the decisionmaker nor the public were in a position to evaluate the extent of the environmental consequences of the project.

The requirement that federal agencies discuss measures to mitigate environmental harm was not the invention of the court of appeals. Petitioners themselves urge that "NEPA requires environmental analysis and disclosure, and the government must therefore discuss mitigation in a manner that aids reasoned decisionmaking." Pet. Br. 19.

The CEQ regulations expressly require *every* EIS to "include discussions of: . . . means to mitigate adverse environmental impacts . . . ." 40 C.F.R. § 1502.16(h) (emphasis added).[6] Petitioners err, therefore, in asserting that an "agency's obligation to discuss mitigation measures will depend on the nature of the proposed agency action." See Pet. Br. 20.

Petitioners contend "[i]t would not be feasible, and often would be counterproductive, to develop a 'complete mitigation plan' in every circumstance," Pet. Br. 20, but do not identify any language in the court's opinion *requiring* preparation of a "plan" in "every" circumstance. A federal agency may choose any of a variety of techniques

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[6]Petitioners concede that the CEQ regulations are binding on all federal agencies and deserve substantial deference from the courts. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979); Exec. Order No. 1191, 3 C.F.R. 123, 124 (1978); see Pet. Br. 16, 20.

to mitigate environmental impacts, including avoiding, minimizing, rectifying, and reducing or eliminating the impact. *See* 40 C.F.R. § 1508.20(a)-(d). Mitigation does not require a compensation plan, that is to say, a plan to provide a substitute environment—although that was the way in which the Corps chose to mitigate the impact of the Elk Creek Dam on wildlife. See 40 C.F.R. § 1508.20(e). Since the choice of how, or even whether, to mitigate is solely the agency's, the choice of preparing a complete compensation "plan," or accomplishing mitigation through some other method, is completely within the agency's control.

Petitioners argue that the discussion of wildlife mitigation measures in the *Elk Creek Supplemental Statement* was sufficiently thorough, contending that "the lower courts have specifically held that where mitigation details are contingent on presently unknown factors, it is appropriate for an agency to restrict its discussion accordingly." Pet. Br. 24-25. Petitioners fail to cite this Court to a single lower court decision supporting their contention.[7] Moreover, such a principle would make no sense where an

[7]Petitioners' suggestion that their proposition at least follows from *Concerned Citizens on I-190 v. Secretary of Transportation*, 641 F.2d 1, 5-6 (1st Cir. 1981), is incorrect. There, an environmental impact statement failed to discuss the impacts of future development in any detail. *Id.* The court nevertheless held that the statement was "minimally acceptable," because the manner and extent of future development by third parties was highly speculative. *Id.* In other words, the agency was relieved of discussing the impacts in detail, not because they were unknown, but because they were unknowable. In this case, the Corps never suggested that the development of its compensation plan was a matter for speculation. Rather, the Corps stated that the plan would be developed based upon evidence and expert advice: in particular, the results of an-

(Continued on following page)

agency expressly relied upon an ill-defined compensation plan to reduce environmental impacts.

Petitioners' final argument, that the court's holding would prevent federal agencies from "tiering," has no merit. See Pet. Br. 19 n. 9, 26. Tiering simply involves the preparation of a series of EIS's, progressing from the general to the specific. 40 C.F.R. §§ 1502.20, 1508.28. "Tiering is appropriate," for example, "when the sequence of statements . . . is . . . [f]rom a program, plan or policy EIS . . . to a site-specific statement or analysis." 40 C.F.R. § 15.08.28(a).

A site-specific statement, like EIS's in general, must discuss the impacts specific to the proposed action in detail. 40 C.F.R. § 1502.20. An agency may not tier from a site-specific statement to a subsequent statement unless the deferred issues are not yet ripe for decision.[8] *See* 40 C.F.R. § 1508.28(b).

In this case, as in any case where an agency relies on mitigation to compensate for the environmental consequences of a proposed action, the issue of mitigation is inextricably bound up in the decision to proceed. Thus, the court of appeals' refusal to condone the Corps' failure to discuss mitigation meaningfully was consistent with the CEQ regulations governing tiering.

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other wildlife compensation plan and the recommendations of state and federal fish and wildlife agencies. *Elk Creek Supplemental Statement* 6. Thus, *Concerned Citizens on I-190* serves as no excuse for the Corps' failure to complete its compensation plan.

[8]Here, the Corps never even hinted that it intended to tier the *Elk Creek Supplemental Statement* to a subsequent EIS or supplement discussing mitigation measures.

Furthermore, the court's interpretation of the CEQ regulation requiring the discussion of mitigation fulfills the twin purposes of an EIS: to make "environmental information . . . available to public officials and citizens before decisions are made and before actions are taken," 40 C.F.R. § 1500.1(b); and "to help public officials make decisions that are based on understanding of environmental consequences." *Id.* Therefore, this Court should not disturb the decision of the court of appeals.

B. NEPA Requires Disclosure And Consideration Of Worst Case Possibilities.

Agency proponents of a project have every incentive to cast the project in the best light possible. Petitioners' plea for the discretion to omit any discussion of the worst case impacts of agency proposals from EIS's therefore comes as no surprise. Petitioners make two arguments in support of their plea. Petitioners argue first that the CEQ eliminated the requirement to consider worst case possibilities in amending 40 C.F.R. § 1502.22 in 1986, and that the Court should defer to the CEQ's decision. *See* Pet. Br. 30-31. Second, petitioners argue that the worst case analysis is a "methodology" for evaluating environmental impacts, and that courts cannot impose such methodologies on agencies. Pet. Br. 27 (citing *Vermont Yankee*). The first argument is contrary to NEPA, and the second argument mischaracterizes the nature of the worst case requirement.

1. NEPA Requires That Worst Case Scenarios Be Considered When There Is Uncertainty About Environmental Impacts.

Courts have widely recognized that the obligation to consider the full range of possible environmental impacts

of federal proposals springs from NEPA itself.[9] As this Court stated: "NEPA's instruction that all federal agencies comply with . . . [its] requirements . . . 'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic." *Flint Ridge Development Co. v. Scenic Rivers Assoc. of Oklahoma*, 426 U.S. 776, 789 (1976). NEPA "places upon an agency the obligation to consider *every* significant aspect of the environmental impact of a proposed action." *Vermont Yankee*, 435 U.S. at 553 (1978) (emphasis added). Because NEPA requires that environmental impacts be considered *before* proposals are adopted, agencies must necessarily predict what those impacts will be. "Reasonable forecasting and speculation is thus implicit in NEPA." *Scientists' Institute For Public Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). *See also Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978), *vacated in non-pertinent part sub. nom. Western Oil & Gas Association v. Alaska*, 439 U.S. 922 (1978) (decisionmakers must consider the cost of proceeding in the face of uncertainty).[10]

In projecting a full range of possible impacts, agencies must necessarily include "worst" as well as "best" case

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[9] "One of the federal government's most important obligations is to present to the fullest extent possible the spectrum of consequences that may result from agency decisions and the details of their potential consequences for the human environment." CEQ, *Answers to 40 Most Asked Questions On NEPA's Regulations*, 46 Fed. Reg. 18,026, 18,032 (1981) (answer to question 20a).

[10] *See also* 40 C.F.R. § 1508.27(b)(5) (in determining significance, agencies are to consider "the degree to which the effects on the environment are uncertain or involve unique or unknown risks").

scenarios.[11] The CEQ recognized this when, in 1978, it adopted 40 C.F.R. § 1502.22. See Pet. Br. 2a. That regulation required agencies to obtain information to cure uncertainty unless the cost of acquiring such information was exorbitant or the information was otherwise unavailable. 40 C.F.R. § 1502.22(a) (1978). If the cost *was* exorbitant or the information *was* unavailable, agencies were to disclose the fact that information was missing, and "include a worst case analysis and an indication of the probability or improbability of its occurrence." 40 C.F.R. § 1502.22(b) (1978).

Lower courts uniformly found that the CEQ's worst case regulation embodied obligations that derived from NEPA (as interpreted by the courts prior to the CEQ's regulations). *See Sierra Club v. Sigler*, 695 F.2d 957, 971 (5th Cir. 1983) ("CEQ's worst case analysis merely codifies . . . judicially created principles"); *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984) (same); *Save Our ecoSystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984) (same).[12] Commentators for the most part agreed. *See* N. Yost, *Don't Gut Worst Case Analysis*, 13 Envtl. L. Rep. (Envtl. L. Institute) 10,204 (1983). (Mr. Yost was

[11]Because it was aware that agencies would attempt to focus on positive information at the expense of negative information, the CEQ admonished agencies to fully disclose "both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8(b).

[12]"[T]he courts and the CEQ have acted almost symbiotically in developing NEPA law by judicial interpretation of NEPA and the CEQ's guidelines and the CEQ's codification of judicial decisions." V. Fogelman, *Worst Case Analysis: A Continued Requirement Under the National Environmental Policy Act?*, 13 Columb. Jrnl. of Envtl. Law 53, 59-60 (1987).

general counsel to the CEQ at the time the worst case regulation was adopted.)[13]

Because NEPA requires that agencies consider the full spectrum of potential adverse impacts when there is uncertainty, agencies must consider worst as well as best case possibilities if they are to comply with NEPA. This is all that was required by the court of appeals.

2. The CEQ's Amendment Of 40 C.F.R. § 1502.22 Should Not Be Interpreted As Eliminating The Requirement For A Worst Case Analysis When Information Is Missing.

When the Justice Department began to lose cases in which agencies had refused to prepare the worst case analysis required by 40 C.F.R. § 1502.22, the Department chose to pressure the CEQ into changing the regulation rather than instruct agencies to comply with it. *See* V. Fogelman, *Worst Case Analysis: A Continued Requirement Under The National Environmental Policy Act?*, 13 Columb. Jrnl. of Envtl. Law 53, 66 (1988). The CEQ attempted to accommodate the Justice Department by publishing "guidelines," then withdrew the guidelines and initiated formal

[13]Although petitioners claim at one point that "[w]orst case analysis is a product of the CEQ regulations only . . .," Pet. Br. 27, at a later point petitioners quote *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983), for the proposition that the worst case regulation codified "judicially created principles." Pet. Br. 31. Petitioners also quote a statement of the CEQ to the effect that the worst case regulation did not codify prior case law, Pet. Br. 32 n. 26, *quoting from* 51 Fed. Reg. 15,618, 15,625 (1986). Of course, the latter statement was made at a time when the CEQ was amending the regulation and had a vested interest in finding that the regulation was not based upon caselaw. The analysis of Mr. Yost, who actually wrote the regulation, is more pertinent to the actual basis for the regulation.

rulemaking upon a petition from the Pacific Legal Foundation. *Id.* The rulemaking culminated in an amendment to 40 C.F.R. § 1502.22 that eliminated the words "worst case analysis." This, petitioners argue, demonstrates that the CEQ intended to excuse agencies from considering worst case possibilities when addressing uncertainty.[14] Pet. Br. 30-31.

It is not necessary to read the CEQ's amended regulation as excusing agencies from preparing a worst case analysis.[15] The CEQ's amendment of the regulation was

[14]The CEQ's revision of 40 C.F.R. § 1502.22 does require projection of low probability/high consequence events only when such projections are "supported by credible scientific evidence"—the same standard urged by petitioners. On that basis, petitioners argue that agencies never need to consider such events unless they are based upon "scientific" evidence. The CEQ's regulation, however, merely identifies one instance where such a consideration is required, without stating whether there might be other circumstances where worst case possibilities must also be considered. The CEQ's regulation can and should be interpreted not to preclude the application of NEPA's obligation to consider worst case possibilities even when scientific information is not complete. In fact, the consideration of "low probability/high consequence" events required by the regulation *is* a worst case analysis, and the only question is when that analysis should be required.

[15]The starting point in interpreting the CEQ's amendment is NEPA's directive that all "policies, regulations, and public laws of the United States *shall* be interpreted . . . in accordance with the policies set forth in [NEPA]." 42 U.S.C. § 4332 (emphasis added). Because NEPA itself requires that agencies consider possible worst case impacts, an interpretation of the CEQ's amended regulation that excused agencies from such a consideration would be contrary to NEPA. The Court should avoid such an interpretation if possible. *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) ("'[w]here there is an interpretation of an ambiguous regulation which is reasonable and consistent with the statute, that interpretation is to be preferred.'"), *quoting from United Telecommunications Inc. v. Commissioner*, 589 F.2d 1383, 1390 (10th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

based on its erroneous perception that some courts had gone too far in applying the regulation, and *not* on a conclusion that agencies should in all cases be excused from considering worst case scenarios. *See* Proposed Amendment to 40 C.F.R. § 1502.22, 50 Fed. Reg. 32,234, 32,237 (1985) ("[t]he Council believes that the current 'worst case analysis' requirement, *as interpreted by recent judicial decisions*, imposes a requirement on the agencies which goes beyond [the] 'rule of reason'." (emphasis added)).[16] To interpret the CEQ's amendment as limiting the power of federal courts to require compliance with NEPA would go beyond what the CEQ actually did, and create an unnecessary conflict between the CEQ and the courts.

The CEQ's actions here, if they were viewed as eliminating the requirement for a worst case analysis, would

[16]The CEQ was wrong about these opinions. The two opinions that provided the impetus for the CEQ's amendment were *Southern Oregon Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475 (9th Cir. 1983), and *Save Our ecoSystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984). In each case, the Ninth Circuit ordered the BLM (and, in *Save Our ecoSystems*, the Forest Service) to consider at least the *possibility* that the pesticides they proposed to spray might cause cancer—particularly in light of expert evidence and the agencies' own admissions that "no level of exposure to the herbicides [has] been proven safe . . . ." *Save Our ecoSystems*, 747 F.2d at 1245; *see also Southern Oregon Citizens Against Toxic Sprays*, 720 F.2d at 1477 ("One of the BLM's own experts, Dr. Dost . . . admitted to uncertainty among the scientific community as to the carcinogenicity of 2, 4-D."). Despite the fact that the scientific community considered many of the herbicides that the BLM proposed to spray to be a significant health risk, the BLM adopted a *policy* that "[t]opics which address issues of herbicide toxicity and/or human health effects should be avoided." *Save Our ecoSystems*, 747 F.2d at 1246, n. 8. Far from requiring idle speculation, the opinions in these cases simply directed the agencies to consider main stream scientific opinion *at least* as a worst case possibility. Nevertheless, the agencies and the Justice Department continued to press for discretion to ignore such possibilities.

be analogous to those of the National Highway Transportation Safety Administration's (hereinafter "NHTSA's") actions in *Motor Vehicle Manufacturer's Assoc. v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983). In *Motor Vehicle*, the Court struck down NHTSA's rescission of a rule because the agency had not articulated a reasoned analysis for the change. *Id.* at 42. In so doing, the Court noted: "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* The agency's burden is particularly heavy where, as here, the agency's position conflicts with earlier positions. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (striking down agency guideline that "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute."). Here, the CEQ has not articulated any reason for its amendment other than the administrative convenience of the agencies that are subject to NEPA. NEPA, however, was adopted in the first instance precisely *because* federal agencies avoided full consideration of environmental consequences as "inconvenient."

The CEQ's regulations were promulgated pursuant to an Executive Order, and not pursuant to NEPA.[17] Thus, the CEQ's revision of the worst case regulation was merely procedural, and not entitled to the same weight the Court

[17]NEPA empowers the CEQ "to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in . . . this Act . . ." (42 U.S.C § 4344(3)), but does not give the CEQ the authority to make legislative regulations. The CEQ promulgated its regulations pursuant to Executive Order No. 11,991, 3 C.F.R. 124 (1978).

might give to substantive or interpretive regulations promulgated by an agency that has been charged by Congress with producing regulations in a particular area. While the CEQ's regulations are binding on federal agencies subject to the President's authority,[18] they are *not* binding on courts. This is particularly true where the regulation conflicts not only with NEPA, but also with "earlier pronouncements of the agency." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1978), *quoting from General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).[19] *See generally* V. Fogelman, *Worst Case Analysis, supra*, 13 Columb. Jrnl. Envtl. Law at 80-94.

The court of appeals properly found that where, as here, an agency has omitted potentially serious environmental impacts from its NEPA documents, the CEQ's amendment of its regulation does not excuse the agency from considering the worst possible consequences of proceeding. The obligation to consider such consequences is not judicially imposed, but *is* judicially enforceable.

[18]See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1978).

[19]Although in *Andrus* the Court found that the CEQ's reinterpretation of its guidelines governing the preparation of EIS's for appropriation requests was valid, the Court emphasized that the reinterpretation occurred during a "detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all agencies." 442 U.S. at 358. In the instant case the reinterpretation was admittedly undertaken because the CEQ disagreed with the unanimous conclusion of courts that had considered the issue that NEPA required consideration of worst case consequences.

3. The Worst Case Analysis Merely Implements NEPA's Full Disclosure Requirements And Does Not Impose Extra-NEPA Procedural Requirements.

Petitioners mischaracterize the worst case requirement as a "methodology" for meeting NEPA's requirements, and complains that the court of appeals by requiring disclosure of the worst case, imposed its own procedural "methodology" upon the Corps. Pet. Br. 27. Petitioners' characterization o fthe court of appeals' decision is plainly an attempt to fit this case into the rubric of *Vermont Yankee* that courts should not impose judicially created procedural requirements upon agencies.[20] Because petitioners' argument relies on a mischaracterization of the court of appeals' decision, it should be rejected.

The "worst case analysis" requirement is *not* a "methodology" or a "procedure." It is simply a require-

[20]Petitioners complain that the courts have "repeatedly overturned agency worst case analyses and instructed the agency to evaluate rigorously a broad spectrum of highly remote possibilities . . . ." Pet. Br. 28. That statement is demonstrably incorrect. Only one case, *Save Our ecoSystems v. Clark*, 747 F.2d 1240 (9th Cir. 1985), has found an agency worst case analysis to be inadequate. The other cases cited by petitioners, as well as this one, have all involved agency refusals to consider worst case possibilities *at all*. *See Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983) (agency failed to consider worst case possibilities); *Southern Oregon Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475 (9th Cir. 1983), *cert. denied*, 469 U.S. 1068 (1984) (same). In several cases that the petitioners fail to acknowledge, the Ninth Circuit has specifically found agency worst case analyses to be adequate. *See, e.g., Northwest Coalition For Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 597-98 (9th Cir. 1988) (finding worst case analysis of risk of pesticides to be adequate); *Oregon Environmental Council v. Kunzman*, 817 F.2d 485, 496 (9th Cir. 1987) (same); *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 988 (9th Cir. 1983) (finding worst case analysis not required under facts of that case)

ment that agencies disclose and consider the worst possible consequences of proceeding with a project. Agencies may choose *any method they like* for determining what the worst case will be. There is no language in the opinion of the court of appeals imposing or suggesting a particular "procedure" or "methodology" that agencies must employ in deriving the worst case.

In a further attempt to cast the court of appeals' decision as an example of judicial activism, petitioners argue that lower courts have "declar[ed] 'the specific worst case to be examined by the agency on remand, including the particular scientific models and studies to be applied and the research to be performed.'" Pet. Br. 28. Again, petitioners do not cite *any* specific language from the opinion it is challenging. In fact, the quoted passage does not come from a judicial opinion at all. Rather, it is taken from a law review article that does not itself cite a single instance where a court has actually "declared the particular scientific models and studies to be applied and the research to be performed." In fact, *no court*, and certainly not the court of appeals in this case, has attempted to impose *any* particular methodology for addressing worst case consequences on *any* agency.[21] It would be a serious disservice to the integrity of the court of appeals to reverse the opinion of the court based upon petitioners' mischaracterization of the opinion.

[21]Ironically, petitioners in another part of their brief complain that there was not *enough* guidance as to how to prepare a worst case analysis. *See* Pet. Br. at 28 ("the CEQ's regulation gave no explanation of how an agency was to go about conducting a worst case analysis. As a result, federal agencies encountered substantial difficulties in implementing the worst case requirement.")

4. Petitioners Failed to Disclose and Consider Worst Case Impacts In This Case.

The court of appeals found that, while the Corps recognized that there was uncertainty regarding the risk of turbidity increases in the Rogue River from the Elk Creek Dam, the Corps did not disclose the worst case that might occur if that risk became manifest. Pet. App. 14a. Petitioners argue that "there were no meaningful 'gaps in relevant information or scientific uncertainty'," and therefore no reason to apply 40 C.F.R. § 1502.22. Petitioners admit, however, that the ODFW disagreed with the Corps' statement in the text of the *Elk Creek Supplemental Statement* that Elk Creek would make only a small contribution to the flow of the Rogue River. Pet. Br. 34. The Corps' grudging concurrence in response to the ODFW's comment demonstrates significant uncertainty about the effects of the dam on turbidity,[22] and the court properly found that, under these circumstances, the Corps must at least consider the consequences should the "worst case" occur.[23]

The court of appeals also held that, pursuant to 40 C.F.R. § 1502.22(a), the Corps must first attempt to cure the uncertainty by performing research, and should only prepare a worst case analysis if the cost of research is

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[22]In addition, there was uncertainty whether the multi-level intake tower within the dam could actually minimize turbidity effects on the Rogue River fishery. See text at pages 3, 41-42. There was also uncertainty about the effects of the project on turbidity during average, high, and normal low water years. See text at page 6.

[23]Petitioners do argue that the significant influence of the Elk Creek Dam on the Rogue River was recognized in a 1974 water quality report, and that report was "referenced" in petitioner's supplemental statement. But NEPA does not permit agencies to bury their discussions of adverse impacts in documents which are merely "referenced" in an EIS.

exorbitant, or the information is otherwise beyond the agency's ability to obtain. The CEQ has not materially revised 40 C.F.R. § 1502.22(a), and petitioners do not argue that agencies are not obligated to perform research to cure uncertainty. The Court therefore need not reach petitioners' challenge to the court of appeals' statements regarding worst case requirements, because the Corps has not determined whether it is even subject to those requirements.

II. SIGNIFICANT NEW INFORMATION REQUIRED THE PREPARATION OF A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT.

Petitioners insist that the Corps' evaluation of the significance of new information was correct, entitled to substantial deference, and reviewable only under the "arbitrary and capricious" standard of review. Petitioners err on all three counts. The determination of significance is either a conclusion of law or ultimate fact. As such, the agency's determination deserves no deference and is subject to a strict standard of review under the APA. Whatever standard of review is applied in this case, however, the new information was clearly significant.

A. The Court Should Strictly Review The Corps' Conclusion That New Information Was Not Significant.

Resolution of the issue of significance does not, as petitioners argue, involve a determination requiring " 'a high level of technical expertise,' " nor is it one which must be " 'left to the informed discretion of the responsible federal agencies.' " See Pet. Br. 36, *quoting from Kleppe*, 427 U.S. at 412. The issue in *Kleppe* involved a policy choice for an agency: whether to prepare a comprehen-

sive EIS, or several, individual, site-specific statements. Preparation of a supplemental EIS does not involve a policy choice for an agency, nor does it require the resolution of a purely factual issue.

A supplemental EIS must be prepared "if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). Like all other regulations of the CEQ, this one is binding on all federal agencies and must be given substantial deference by the courts. *Andrus*, 442 U.S. at 358; Exec. Order No. 1191, 3 C.F.R. 123, 124 (1978).

Under the CEQ regulation, if new information relevant to environmental concerns and bearing on a proposed action or its impacts is deemed significant, then those environmental concerns must be considered in an agency's decisionmaking process. *See Baltimore Gas & Electric Co.*, 462 U.S. at 97; *Vermont Yankee*, 435 U.S. at 553. The determination of significance is thus an issue of paramount importance. This Court has itself recognized the importance of such decisions, noting that they must be subjected to "a thorough, probing, in-depth review." *Citizens to Preserve Overton Park*, 401 U.S. at 415.

In reviewing the agency's decision, the Court should bear in mind that Congress deliberately took away the discretion federal agencies may once have had to decide whether or which environmental concerns should be considered. One of the prime motivations for the enactment of NEPA was the frequent failure of federal agencies to include environmental considerations in their decisionmaking. *Andrus*, 442 U.S. at 350-351. Congress had to mandate the preparation of EIS's as an

"action-forcing" device: to compel the agencies to integrate environmental concerns into their planning. *Id.; Kleppe*, 427 U.S. at 409; 40 C.F.R. § 1502.1 ("The primary purpose of an EIS is to serve as an action-forcing device to insure that the policies and goals in the Act are infused into the ongoing programs and actions of the Federal Government."). Congress went even further. It ordered federal agencies to comply with NEPA's procedural mandate "to the fullest extent possible," 42 U.S.C. § 4332, a phrase which was "neither accidental nor hyperbolic," but "a deliberate command that the duty NEPA imposes . . . not be shunted aside in the bureaucratic shuffle." *Flint Ridge Development Co.*, 426 U.S. at 787.

In view of their proclivities to ignore and omit consideration of environmental factors, the agencies should not be allowed broad discretion to decide which environmental concerns are significant. Such leniency would undoubtedly signal a return to the days before the passage of NEPA.[24] *See* S. Rep. No. 91-296 at 20 (1969). Consequently, agencies should not be permitted to decide whether or which environmental concerns are significant without a searching review by the courts.

Despite petitioners' repeated urging, the "arbitrary or capricious" APA standard of review is inappropriate, because the decision whether new information is "sig-

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[24]Senator Muskie, one of the key sponsors of NEPA stated:

> The concept of self-policing by Federal agencies . . . is contrary to the philosophy and intent of existing environmental quality legislation. In hearing after hearing agencies of the Federal Government have argued that their primary authorization . . . takes precedence over [environmental requirements].

115 Cong. Rec. 29,053 (1969).

nificant" enough to justify the preparation of a supplement is neither a pure factual issue nor a policy choice. *See Citizens to Preserve Overton Park*, 401 U.S. at 416. Rather, it is a legal determination, or, at a minimum, a determination of ultimate fact.[25]

The appropriate standard of review, then, is set forth both in § 706(2)(A) (was the determination of significance "in accordance with law"), and in § 706(2)(D) of the APA (was the determination reached by observing "procedures required by law").[26] Under the latter standard, if an agency inadequately considers the significance of new infromation, and thereby avoids observance of NEPA's procedural requirements, the agency's decision should be set aside. *See Vermont Yankee*, 435 U.S. at 549 n.21; *Citizens to Preserve Overton Park*, 401 U.S. at 417. To satisfy this standard, an agency must reasonably review the significance of new information. *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1463-1464 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980).

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[25]Questions of ultimate fact are "questions in which the historical facts are admitted or established, the rule of law is undisputed and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1981). Such questions are sufficiently "legal" to be for the most part "independently reviewable by an appellate court." *Id.* Thus, when a court reviews an agency's determination of ultimate fact, the question is sufficiently legal to allow the court to "substitute its judgment for that of the [agency]." *Helvering v. Tex-Penn Co.*, 300 U.S. 481, 491 (1937).

[26]*See FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) ("The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are . . . for the courts to resolve, although the courts are to give some deference to [the agency].").

The "without observance of procedure required by law" standard of review was used by the court of appeals in this case.[27] Pet. App. 7a-8a. Contrary to petitioners' allegation, Pet. Br. 37, five of the other six courts of appeals which appear to have ruled on the supplementation requirement have *also* adopted the reasonableness standard of review. *Cuomo v. U. S. Nuclear Regulatory Commission*, 772 F.2d 972, 974-975 (D.C. Cir. 1985); *Louisiana Wildlife Federation v. York*, 761 F.2d 1044, 1051-1052 (5th Cir. 1985); *National Wildlife Federation v. Marsh*, 721 F.2d 767, 782, *rehearing denied*, 747 F.2d 616 (11th Cir. 1983); *Massachusetts v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983); *Monarch Chemical Works, Inc. v. Thone*, 604 F.2d 1083, 1087 (8th Cir. 1979). The "rule of reason" has recently been endorsed by the CEQ, too. *See* 51 Fed. Reg. 15,618, 15,621 (1986).

The reasonableness of an agency's decision not to supplement

> depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported

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[27]The dissent, as well as the majority, employed the reasonableness standard of review. See Pet. App. 21a-22a. Moreover, the dissent, like the majority, conducted its review by examining the evidence in the record to evaluate whether the Corps reasonably decided not to prepare a supplement. Pet. App. 22a (To evaluate the propriety of the Corps' decision, "we must first examine the relevant evidence in the administrative record."). Petitioners' claims that Judge Wallace "observed . . . [that] the court . . . employed the incorrect legal standard," Pet. Br. 38; charged that the majority "departed from its proper appellate role," and implied that the majority "assumed the role of a de novo factfinder charged with responsibility for making scientific determinations," Pet. Br. 36, are therefore untenable.

its decision not to supplement with a statement of explanation or additional data.

Warm Springs Dam Task Force, 621 F.2d at 1024.[28]

Only the Seventh Circuit has used the "arbitrary or capricious" standard to review an agency decision not to supplement an EIS. *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984). The court held there "that an agency cannot have acted arbitrarily or capriciously in deciding not to file a . . . [supplement] unless the new information provides a *seriously* different picture of the environmental landscape such that another hard look is necessary." *Id.* at 418 (emphasis in original).

Whether the Court deems the appropriate APA standard of review to be "arbitrary or capricious," "not in accordance with law," or "without observance of procedure required by law," the Corps' decision not to supplement

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[28]In *Warm Springs Dam Task Force*, the court concluded that the Army Corps of Engineers' decision not to supplement was unreasonable, even though the new information "dealt in possibilities and speculation," and "was more significant for the questions it raised than for the answers it gave." 621 F.2d at 1025. The basis for the court's conclusion was the Corps' failure adequately to explore the environmental considerations raised by the new information in its earlier environmental impact statements. Although the court did not believe a formal supplement was necessary, it found that the new information "raised sufficient environmental concerns to require the Corps to take another hard look at the issues." *Id.* The court held that the Corps took the requisite hard look only because the agency launched an extensive ten-month study in conjunction with state and federal agencies; and resolved the concerns raised by the new information to the satisfaction of independent experts, the Corps' Independent Board of Consultants, and California's Secretary of Resources. *Id.* at 1025-1026. Then-Judge Kennedy concurred in the judgment that the ten-month study adequately evaluated the new information and explained why no new environmental impact statement was necessary. *Id.* at 1027.

the *Elk Creek Supplemental Statement* does not pass muster. New information generated by the ODFW and SCS was significant because it raised new environmental concerns, and exposed radically different dimensions to existing environmental concerns about the impact of the Elk Creek Dam on the fishery of the Rogue River. In coming to the opposite conclusion, the Corps, *inter alia*, ignored the opinions of the very independent experts it had hired to evaluate the ODFW report, and repudiated the very methodology it had used to predict the turbidity-producing potential of the Elk Creek Dam.

B. New Information Provided To The Corps Was Significant.

1. The ODFW Report.

Information made available to the Corps after the preparation of the *Elk Creek Supplemental Statement* by scientists with the ODFW constituted significant new information requiring the preparation of a supplemental EIS. The new information was relevant to four separate environmental concerns bearing on the Elk Creek Dam project or its impacts. Those four concerns are the following: early emergence and decreased survival of spring chinook salmon; infection of fall chinook salmon with disease organisms; decreased fish production and harvesting; and reduction of recreational fishing.

Even though the Corps dismissed the foregoing concerns as insignificant, the U. S. Fish & Wildlife Service (hereinafter "USFWS") considered them significant enough to warrant the preparation of another supplemental EIS. Letter from Russell D. Peterson to Colonel Gary

R. Lord (Dec. 20, 1985), District Court Doc. No. 40, A.R. Doc. No. 105, at 1-2. The USFWS also believed a supplemental EIS to be in order because there may no longer be a need for the water storage assumed to be necessary in the *Elk Creek Supplemental Statement*. Pet App. 13a n. 7.

a. Spring Chinook Salmon—Early Emergence And Decreased Survival.

Since the Corps' closure of the Lost Creek Dam, ODFW scientists observed a seventy-eight percent decrease in the abundance of juvenile spring chinook salmon near the dam. Cramer et al., *Lost Creek Dam Fisheries Evaluation Phase I Completion Report* (hereinafter *ODFW Report*), District Court Doc. No. 21, A.R. Doc. No. 92, at Vol. I 78-79.1,[29] Appendix 16, and in the Summary and Recommendations at 4 (Finding No. 1); Deposition of Michael D. Jennings (hereinafter *Jennings Deposition*), District Court Doc. No. 58, Exhibit 11, at 21; Memorandum from Steve Cramer and Mick Jennings to Harry Wagner (Feb. 21, 1985) (hereinafter *Cramer Memorandum*), Pet. Br. 3a. The ODFW scientists found that juvenile fish emerged an average of fifty-two days earlier in the year, at a time when environmental conditions are less favorable; that the earlier emergence resulted from increased water temperatures; and that the increased water temperatures were caused by the gradual release of warmer water from the Lost Creek reservoir. *ODFW Report* Vol. I 75, Appendix 11, and in the Summary and Recommendations 4-5 (Findings No. 2 and 3); *Jennings Deposition* 7-9, 15, 17; *Cramer Memorandum*, Pet. Br. 3a.

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[29]The ODFW scientists submitted the *ODFW Report* to the Corps in August, 1985. District Court Doc. No. 21.

On the basis of this data, the ODFW scientists concluded that "warming of the Rogue River by Lost Creek Dam during October-January . . . caused [the] early emergence and reduced survival of spring chinook fry." *Cramer Memorandum*, Pet. Br. 3a; see also *Jennings Deposition* 9. They then developed a mathematical model which indicated a thirty to forty-five percent decrease in fry survival for a one degree Celsius increase in temperature. Pet. Br. 9a.

The ODFW scientists were concerned that the Elk Creek Dam might produce conditions which would parallel those observed below the Lost Creek Dam, thereby aggravating the decreased survivability and viability of spring chinook salmon. *Jennings Deposition* at 15-16, 19, 24; Deposition of Steven P. Cramer (hereinafter *Cramer Deposition*), District Court Doc. No. 58, Exhibit 12 at 15-16. They therefore believed that further study was warranted before construction of the Elk Creek Dam proceeded. Deposition of James A. Lichatowich (hereinafter *Lichatowich Deposition*), District Court Doc. No. 58, Exhibit 10 at 13-14; *Cramer Deposition* 16; *Cramer Memorandum* Pet. Br. 3a.

Petitioners contend that the Corps evaluated the findings made by the ODFW scientists, their mathematical model, and their concerns, and reasonably concluded that none of them constituted significant new information requiring the preparation of a supplemental EIS. Pet. Br. 39-42. Petitioners are wrong. The Corps' evaluation of the findings and concerns expressed by the ODFW scientists was incomplete and slanted, rendering its conclu-

sion about their significance unreasonable, and even arbitrary and capricious:

> Item: In the *Elk Creek SIR*, "[t]he Corps found th[e mathematical model relating temperature increases to fish mortality] to be of questionable worth since it had not been validated and did not take into account the Elk Creek Dam's beneficial effects during egg incubation and fry rearing." Pet. Br. 40; *see Elk Creek SIR*, Pet. Br. 9a-10a.

The *Elk Creek SIR*, which was not prepared until three months after the commencement of this case, almost two and a half years after submission of the *ODFW Report* to the Corps, clearly framed the issue only in terms of the significance of the *mathematical model*. The Corps failed to consider the factual findings about the *actual* effects of environmental factors on spring chinook fry, even as it conceded that "warming of the river . . . could expose the fry to a wintertime lack of food and the possibility of being swept out of optimal rearing habitat." *Elk Creek SIR*, Pet. Br. 9a.

The first of the two independent experts "hired specifically to consider and evaluate the significance of the *ODFW Report*," Pet. Br. 41, expressly stated that the conclusions regarding the relationship between temperature increases and fish mortality were "probably valid:"

> Since abundance was very likely to have been negatively effected [sic] by the cooler [sic: warmer] than ambient egg incubation water, their data showing less juveniles near the dam is real, not accidental, and probably for the reasons cited in Conclusion 2[: as a result of early emergence caused by the increase in river temperatures in November and December generated by the dam]. . . . [*T*]*he authors' conclusions expressed in findings 1, 2, and 3* [*in the Summary and Recommendations*] *regarding loss near the dam due to early emergence are probably valid.*

Mathews, *Critique of Lost Creek Dam Fisheries Evaluation* (hereinafter *Mathews Critique*), *District Court Doc.* No. 40, A.R. Doc. No. 112, at 3-4. (Emphasis added.) The second independent expert also commented on the ODFW scientists' findings, stating that they "were considered in a logical framework of biological knowledge of . . . effects of environmental factors on fish production . . . ." Calvin, *Review Report*, District Court Doc. No. 40, A.R. Doc. No. 114, at 1.[30]

As for the supposed compensatory "beneficial effects [of the dam] during egg incubation and fry rearing," Pet. Br. 40, the Corps itself was uncertain about them. *Elk Creek SIR*, Pet. Br. 9a-10a ("The reduction of peak floodflows can *partially or fully* offset the negative effects of temperature increases on fry survival." Emphasis added.). Moreover, the only effect of reducing peak floodflows would be maintenance of the *size* of the spring chinook population. *See ODFW Report* in the Summary and Recommendations 4-5 (Findings No. 2 and 3) *and Mathews Critique* 4-5. Flow regulation would not remedy the potential reduction in genetic diversity, which could reduce the viability of the species itself. *Lichatowich Deposition* 11-12; Memorandum from Jim Lichatowich to Harry Wagner

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[30]Even the Corps agreed that "the biological reasoning [wa]s sound and has been recognized for some time . . . ." *Elk Creek SIR*, Pet. Br. 10a.

(Apr. 30, 1985) (hereinafter *Lichatowich Memorandum*), District Court Doc. No. 4, Exhibit 14, at 1-2. The concern over reducing genetic diversity was never challenged, considered, or answered either by the Corps or the independent experts.

> Item: Petitioners claim that "[m]odeling of downstream temperatures, using 1978 through 1979 as validation years, indicated that the Elk Creek Dam would have little effect on water temperatures." Pet. Br. 40.

Buried in a footnote is petitioners' admission that the Corps' own modeling results showed a temperature increase of about 0.6° Celsius in parts of July, August, and December 1979. Pet. Br. 40 n.38. *See* Affidavit of Mark S. Dortch, District Court Doc. No. 25, at 2. The ODFW Assistant Chief of Fisheries was particularly concerned about the adverse effects of temperature increases in December, because

> [i]t just makes good biological common sense, regardless of the statistical proofs, that warm water in winter will accelerate egg development (we know this) and if those juveniles leave the gravel too early they will face cold temperatures, high flows and low food abundance. Those conditions have to reduce their chances of survival. . . . [Even] a persistent, small loss of 5-10% could be very detrimental if that loss were directed towards a specific portion of the run; i.e., if the mortality were selective.

Lichatowich Memorandum 1-2. As indicated above, the Corps did not question the accuracy of the information bearing on the project's impacts on genetic diversity, did not consider the information, and did not respond to it.

> Item: "The Corps . . . noted that the Elk Creek Dam's multilevel intake tower, which allows water discharges from different temperature zones within the reservoir, would minimize adverse effects on fisheries resources." Pet. Br. 40.

The Corps never intended to use the multilevel intake tower to control temperature during the winter flood season, however, *Elk Creek Supplemental Statement* 7; *Elk Creek Lake Draft Environmental Impact Statement* Supp. No. 1 (Feb. 1980) (hereinafter *Draft Elk Creek Supplemental Statement*), District Court Doc. No. 21, A.R. Doc. No. 6, at 7. Perhaps for that reason, the Corps failed both to develop a specific plan of operation for the multiport structure, and to evaluate its capacity for minimizing the adverse effects of the Elk Creek Dam on fish production. *See* Letter from Russell D. Peterson to Colonel Gary R. Lord (Dec. 20, 1985) (hereinafter *Peterson Letter II*), District Court Doc. No. 40, A.R. Doc. No. 105, at 1 *and* Letter from Russell D. Peterson to Vince Steinkamp (Aug. 7, 1985) (hereinafter *Peterson Letter I*), District Court Doc. No. 40, A.R. Doc. No. 104, at 2. In fact, the Corps has refused to give any assurance that it actually *will* use the structure to protect the fishery. *See Elk Creek Supplemental Statement* 83 (Response to Comment 14-3) ("All project purposes and impacts would . . . be taken into consideration before taking action of this type.").

In any event, the Corps' confidence in the multilevel intake tower was unwarranted. According to the NMFS,

> The multi-level outlet structure in Lost Creek Reservoir does provide considerable flexibility in selecting

> outflows of proper temperature and turbidity. Based on the available data, however, this flexibility would be reduced at an Elk Creek reservoir due to the higher water temperatures and turbidities that would be expected in Elk Creek as compared to Lost Creek.

Evans Letter 3-4 (Comment 32-8). In particular, were the Corps to release cooler water from Elk Creek Dam in the winter in an attempt to prevent premature emergence of spring chinook fry, turbidity levels in the Rogue River could be increased. *Elk Creek Supplemental Statement* 136 (Comment 32-8). Moreover, the increase would come during the time of year when turbidity levels in the Rogue are already high. *Id.* at 22. Thus, the release of cooler water in the winter to prevent early emergence of spring chinook may create additional, unforeseen, and unconsidered problems for fish production in the Rogue River.

b. Fall Chinook Salmon—Potential For Disease.

Following the construction of the Lost Creek Dam, an epizootic disease caused fall chinook salmon populations to suffer mortality of seventy-six percent in 1979 and thirty-two percent in 1980. *Cramer Deposition* 40-41. The ODFW scientists were concerned that the Elk Creek Dam would pose the same disease potential apparently created by the Lost Creek Dam. *Id.* at 34, 40-41.

According to petitioners, the Corps justifiably dismissed that concern because "Corps-funded ODFW studies had failed to detect disease-causing organisms in the Lost Creek outflow; furthermore, there were no similar epizootic outbreaks following closure of the Applegate Dam." Pet. Br. 40-41; *Elk Creek SIR*, Pet. Br. 10a-11a. The *Elk Creek SIR* neglected to mention, however, that the

tests used to detect disease-causing organisms were not sensitive enough. *Cramer Deposition* 36, 37. "[T]he testing techniques [therefore] were insufficient to discount the hypothesis [that disease-causing organisms in the Lost Creek outflow caused the epizootic]; they were also insufficient to adequately test the hypothesis." *Id.* at 37. Consequently, the hypothesis is still viable. *Id.* at 36-37.

Given the magnitude of mortality following the closure of the Lost Creek Dam, the explanation that "there were no similar epizootic outbreaks following closure of Applegate Dam" hardly can be considered adequate to support a decision not to prepare a new supplemental EIS. The ODFW scientists never claimed that a causal link between the construction of the Lost Creek Dam and the subsequent epizootics definitely existed. What they did express, however, was a legitimate concern that there might be a connection between dam construction and epizootics that deserved further study. The occurrence or non-occurrence of similar mortality elsewhere under conditions that might or might not duplicate those either at Lost Creek Dam or the Elk Creek Dam does not dispel that legitimate concern.

c. Fish Production And Harvesting—Potential For Increased Turbidity.

Scientists with the ODFW and USFWS were concerned that extensive disturbance of the soil in the Elk Creek watershed since the issuance of the *Elk Creek Supplemental Statement* could create higher turbidities. *Jennings Deposition* 40-41, 43-46; *Cramer Deposition* 21; *Peterson Letter I* 2. They therefore recommended further study of the issue before construction of Elk Creek Dam proceeded. *Cramer Deposition* 21-22; *Peterson Letter I* 2.

The Corps did not question whether soils in the watershed had been disturbed. In response to the concern about turbidity generated by that disturbance, the Corps reviewed turbidity data between 1974 and 1985 at Elk Creek.[31] Affidavit of Richard A. Cassidy, District Court Doc. No. 27, at 12. The Corps found that peak average turbidity during storm periods increased in the early 1980's, but returned to earlier levels after 1983. *Id.* Thus, the Corps concluded, "Watershed recovery appears to have occurred to reduce the turbidity levels back to those of the 1970s [sic]." *Id.*

The Corps' conclusion suffers from the same defect that appeared in the draft and final *Elk Creek Supplemental Statement*. The Oregon Department of Environmental Quality (hereinafter "DEQ") pointed out that "average daily turbidity values . . . provide limited information." *Elk Creek Supplemental Statement* 133 (Comment 31-1). For instance, on March 9, 1977, the highest instantaneous recorded turbidity in the upper Rogue River was 330 JTU, but the average value for that day was only 20 JTU. *Id.* at 84 (Response to Comment 14-15). For that reason, the DEQ recommended that the Corps "show the frequency of occurrence of [hourly] values[, which were recorded and provided to the Corps since 1972 by the U. S. Geological Survey]. *Id.* at 133 (Comment 31-1). The Corps' failure to present or evaluate the data since 1980 in that manner casts considerable doubt upon its contention that the watershed recovered from the ground-disturbing activities noted by the ODFW and the USFWS.

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[31]This study and an abbreviated discussion of its results was discussed in the *Elk Creek SIR*. See Pet. Br. 12a.

d. Angling—Potential For Reduced Recreational Fishing.

The ODFW scientists were concerned that the higher flows in the Rogue River that would be caused by the Elk Creek Dam will aggravate the high flows already caused by the Applegate and Lost Creek Dams, and that the increased flows will decrease the effectiveness of lure and fly-fishing in the Wild and Scenic Rogue River. *Jennings Deposition* 27-29; *Cramer Deposition* 23-24, 32. The ODFW wanted to conduct studies to evaluate this concern, but the Corps, which funded the ODFW studies that led to the concern, refused to fund additional studies. *Cramer Deposition* 32. Thus, the Corps' response—"studies on this question are inconclusive," *SIR*, Pet. Br. 11a—was self-serving, and does not excuse the Corps' decision not to prepare a supplemental EIS.

2. The SCS "Report."

The SCS, like the ODFW, provided significant new information to the Corps at the Corps' request after the completion of the *Elk Creek Supplemental Statement*. Roger Borine, employed as a soil scientist by the SCS, testified that in 1979 the Corps asked the SCS to prepare soil maps for the watershed of Elk Creek. See Transcript of January 16, 1986, Hearing on Motion for Preliminary Injunction (hereinafter "Tr."), District Court Doc. No. 45, at 32 (Borine testimony). The SCS re-ordered its priorities to comply with the request, and in 1982 Mr. Borine sent the completed soil maps of the watershed to J. P. Sturgill, *id.*, a physical scientist employed by the Corps. *Id.* at 69 (Sturgill testimony). The Corps did not respond to the SCS, *id.* at 33, 37 (Borine testimony), nor did the

decision-makers at the Corps consider the soil maps in subsequent NEPA decisions about the Elk Creek Dam. *See id.* at 74-75 (Sturgill testimony). The new information from the SCS was not addressed at all in the *Elk Creek SIR.*

Mr. Borine testified that the new information he provided to the Corps in 1982 revealed important inaccuracies in the *1979 Water Quality Report.*[32] Tr. 34-35, 65 (Borine testimony). The *1979 Water Quality Report* stated that only small acreages in the Elk Creek watershed contain moderately to highly erosive swelling clay soils. *Draft Elk Creek Supplemental Statement* 74. The SCS maps, however, showed that "very large acreages" of the shoreline of Elk Creek Lake contain soils "very high" in swelling clays. Tr. 36 (Borine testimony). Mr. Borine testified that these soils have both high "sediment-producing potential" and high "long-term turbidity-producing potential."[33] *Id.* at 46-47.

The Corps never challenged the accuracy of the SCS maps, yet petitioners contend that they "had limited relevance to actual turbidity levels," because soil disturbances, rather than soil characteristics " 'are the chief contributing factor to turbidity in runoff.' " Pet. Br. 42-43, *quoting from Elk Creek Supplemental Statement* 115 (Response to Comment 22-5). Petitioners conveniently ignore the Corps' own use of soil characteristics to predict turbidity, however, as well as testimony that the swelling clays on Elk Creek Lake's shoreline would be disturbed continuously.

Table 4 in the *1979 Water Quality Report* clearly uses soil information to estimate turbidity, *Draft Elk Creek Supplemental Statement* 72-73, and the Corps openly admitted it. *Elk Creek Supplemental Statement* 84 (Response to Comment 14-11). Moreover, the Corps used information about soils and their turbidity potential to analyze the results of the WESTEX model simulations performed in the *1979 Water Quality Report. Id.* (Response to Comment 14-10). Thus, Mr. Borine simply used the Corps' own methodology of predicting turbidity from soil maps to conclude from the SCS maps that the Elk Creek watershed possesses a greater turbidity-producing potential than was indicated in the *Elk Creek Supplemental Statement.* Tr. 46-48, 53 (Borine testimony); see Plaintiffs' Amended Witness Statement, District Court Doc. No. 37, at 1-2.[34] Only when the use of soil maps contradicted the Corps' conclusions about the impacts of the project did the Corps begin to question the importance of soil characteristics in predicting turbidity.

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[32]The *1979 Water Quality Report* was Appendix C to the *Elk Creek Lake Draft Environmental Impact Statement* Supp. No. 1 (Feb. 1980), District Court Document No. 21, A.R. Doc. No. 6.

[33]These terms were used and defined in the *1979 Water Quality Report.* "Sediment-producing potential" is "the susceptibility of soils to erosion and the potential for the soil particles eroded from the soil mass to be transported as sediment in the watercourse." *Draft Elk Creek Supplemental Statement* 73. If sediment-producing potential is "high," "Water action is likely to result in large amounts of sediment being deposited." *Id.* "Long-term turbidity-producing potential" is the "potential for causing water to become cloudy for extended periods." *Id.* If long-term turbidity-producing potential is "high," "Soils are very likely to become muddy and cause turbidity for long periods of time." *Id.*

[34]Plaintiffs' Amended Witness Statement was adopted by Mr. Borine and made an exhibit during the January 16, 1986, Hearing on Motion for Preliminary Injunction. Tr. at 29-30, 31 (Borine testimony).

Mr. Borine also testified that swelling clays, comprising eighty-three percent of the shoreline of Elk Creek Lake, would be subject to constant wave action. Tr. 35-36, 37 (Borine testimony). Consequently, they would be a continuing source of sediment. *Id.* at 51. The Corps concurred, explaining that swelling clays are "significant" because they "continuously feed clay particles to water in contact with their surface," giving them "a high erosion potential where they are unprotected or disturbed." *Draft Elk Creek Supplemental Statement* 74.

Petitioners assert that management techniques "could reduce the effects of wave action on erosive soils." Pet. Br. 43. The Corps neither evaluated nor disclosed the effectiveness of any such management techniques in the *Elk Creek Supplemental Statement*, however. Indeed, the Corps' failure to develop a specific plan of operation to prevent sediment-related water quality problems was one of the chief complaints of the USFWS, as well as the ODFW. *Peterson Letter II* 1; *Peterson Letter I* 2; Letter from Louis Fredd to Jake Szramek (Feb. 9, 1983) and Statement of Oregon Department of Fish & Wildlife to Water Policy Review Board (Apr. 3, 1981), District Court Doc. No. 40, attachments to A.R. Doc. No. 110. For these reasons, the Corps' decision not to supplement the *Elk Creek Supplemental Statement* was properly overturned.

In closing, the court of appeals' opinion can easily be squared with the opinions of this Court in *Baltimore Gas & Electric Co.*, *Vermont Yankee*, and *Kleppe*. None of those cases involved review of an agency's compliance with the procedures actually mandated by NEPA. The court of appeals' holding that the new information in the *ODFW Report* and SCS "Report" was environmentally significant, probably accurate, and inadequately considered or explained by the Corps should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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NOVEMBER 1988

ADDENDUM

REGULATIONS INVOLVED

I.

The Council on Environmental Quality's regulation governing the discussion of environmental consequences, including the mitigation of adverse environmental impacts, provides in pertinent part as follows (40 C.F.R. § 1502.16):

Environmental Consequences

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by secs. 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of sec. 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

• • •

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

II.

The Council on Environmental Quality's regulation governing the preparation of a supplemental environmental impact statement provides in pertinent part as follows (40 C.F.R. § 1502.9):

Draft, final, and supplemental statements

• • •

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

• • •

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

REPLY

BRIEF

Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

(13)

No. 87-1704

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

OREGON NATURAL RESOURCES COUNCIL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents attempt to defend the court of appeals' decision on the same basis that they opposed certiorari—by directing this Court's attention to issues that are not in this case, by arguing that the court of appeals did not really mean what it said, and by positing other rationales for the court's result. Respondents (and their amici) are understandably reluctant to defend the court of appeals' actual reasoning, but their alternative arguments are equally unsatisfactory and are insufficient to support the court of appeals' reversal of the district court's decision in this case.

1. Respondents devote the initial portion of their brief (at 1-8) largely to criticism of the sub-

stantive merits of the Elk Creek Project. The issue in this case, however, is not whether Congress should have approved the project; it is whether the Army Corps of Engineers prepared an adequate environmental impact statement.[1] Respondents' recitation of the Elk Creek Project's adverse environmental consequences itself provides a telling indication of the adequacy of the *Elk Creek Supplemental Statement*: respondents rely almost entirely on that document in describing the project's adverse effects. See Resp. Br. 1, 2, 3, 4, 5, 6, 7, 8. As respondents acknowledge, the *Elk Creek Supplemental Statement* specifically informed the decisionmaker that (among other matters) "[t]he project might enhance fish to some degree, but at best will only compensate for the dam's adverse impacts on other existing fish and wildlife resources" and that "[t]he Elk Creek Dam would displace and, without mitigation, eliminate wildlife populations dependent on the habitat that would be flooded" (Resp. Br. 1, 2 (citing *Elk Creek Supplemental Statement* 5-6, 38, 46, 69-70)). As respondents further acknowledge, the *Elk Creek Supplemental Statement*, in its comment section, alerted the decisionmaker to additional concerns of interested parties and the Corps' responses. See Resp. Br. 3, 4, 5, 6, 7, 8. In short, respondents' extensive reliance on the *Elk Creek Supplemental Statement*'s discus-

[1] Notably, respondents base much of their criticism on a GAO report (A.R. Doc. 35) that addressed the Corps' cost-benefit analysis for the project. But Congress did not find cause in the GAO's report (which, at the requestors' instruction, was not submitted to the Corps for pre-publication comment (*id.* at iv)) to halt funding. And of special relevance here, the GAO report specifically stated that "GAO is not questioning the fish and wildlife benefits other than those related to irrigation" (*id.* at iii)—a component that is no longer a part of the Elk Creek Project.

sion of adverse environmental impact pointedly illustrates that the document fulfilled its objective of assuring that the Corps considered the environmental effects of the proposal and informed the public that the agency has considered environmental concerns in the decisionmaking process. See *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). See also Pet. Br. 14.[2]

2. As the government's opening brief explained (at 15-26), the court of appeals erred in concluding that NEPA requires environmental impact statements to include a complete plan for mitigating environmental damage. Respondents make no attempt to defend such a requirement. Instead, they ask this Court to regard the lower court's explicit pronouncements as no more than "mere dictum" (Resp. Br. 12 n.5). Respondents struggle to recharacterize and downplay the crucial passages of the court of appeals'

[2] Respondents take some liberties in characterizing the record. For example, they contend that the Elk Creek Dam would "increase turbidity downstream in the Rogue River, depressing salmon and steelhead populations" (Resp. Br. 2 (citing *Elk Creek Supplemental Statement* 46)). No such statement appears at the cited page. Instead, the *Statement* indicates (at 37) that "[n]o major adverse effect on fish production in the Rogue River is expected as a result of the changes in the turbidity regime as a result of the Elk Creek project." As another example, respondents contend that "turbidity peaks and their duration" are "not disclosed by the Corps" (Resp. Br. 5). In fact, the *1974 Water Quality Report* shows in graphic and tabular form the turbidity peaks and durations (as well as changes in flow and temperature) with no dams, with Lost Creek, with Elk Creek, and with both dams operating together for four different water years under three different operational modes (A.R. Doc. 4, charts 76-91, tables 18-45, 49-84). The Corps used average daily turbidity figures, rather than hourly figures, because short-term turbidity—except at levels far beyond what would occur here—has little effect on fish survival (*Elk Creek Supplemental Statement* 37).

decision in order to sidestep the issues that prompted the government to seek this Court's review. But that response was unpersuasive at the petition stage, and it is equally unpersuasive now.[3]

The court of appeals unequivocally stated that environmental impact statements "must include a discussion of measures to mitigate adverse environmental impacts" (Pet. App. 5a) and—in respondents' words—that "significant measures must be undertaken to mitigate the adverse effects of a proposed action" (Resp. Br. 12 n.5). The court then imposed that same regimen—using even broader language—in *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810, 819 (9th Cir. 1987), cert. granted, No. 87-1703 (June 27, 1988). Thus, respondents' argument that the court of appeals "did not *require* mitigation (Resp. Br. 12 (emphasis in original)) is flatly contradicted by the court's own words and actions. Similarly, the court of appeals unequivocally required a "complete mitigation plan" (Pet. App. 7a), including an "analysis of the mitigation measures" and an "estimation of how effective the measures will be" (*id.* at 6a-7a), and imposed

[3] The government specifically petitioned this Court to decide whether NEPA "requires federal agencies to include in each environmental impact statement * * * a fully developed plan to mitigate environmental harm" (Pet. I). As the government's petition explained (at 9-14), the question warrants the Court's attention because the court of appeals' answer establishes a rule of law that is fundamentally incorrect (which respondents apparently concede) and establishes a precedent that, as a practical matter, would seriously frustrate or impede a wide range of federal and federally permitted projects. In short, this Court granted review on the question whether NEPA requires that environmental impact statements must include a complete mitigation plan, and it is *that* question that respondents should address.

those same requirements in *Methow Valley Citizens Council*, 833 F.2d at 820. Respondents' argument that the court did not require "'demonstrably effective plans for mitigating environmental harm'" (Resp. Br. 12 (quoting Pet. Br. 14)) thus fails as well.

Respondents' attempt to rewrite the court of appeals' decision should be accepted for what it is—an admission of the indefensibility of the court's reasoning and result. Respondents have effectively confessed that NEPA does not require a "complete mitigation plan" (Pet. App. 7a). They are left defending the court of appeals' decision on an alternative—and far narrower—ground; namely, that *in this particular case*, the "discussion of mitigation failed to provide the decisionmaker with the information necessary to make an informed decision" (Resp. Br. 12). But even that argument is unpersuasive.[4]

[4] The court of appeals found the *Supplemental Statement*'s mitigation discussion wanting only because that court based its evaluation on the novel and mistaken premise that environmental impact statements must provide a "complete mitigation plan" (Pet. App. 7a). See Pet. App. 5a-6a ("Here, the mitigation plan for wildlife is not yet fully developed. * * * We fail to see how mitigation measures can be properly analyzed and their effectiveness explained when they have yet to be developed."). The court presumably would have found the mitigation discussion adequate under any lesser standard. Indeed, even the district court, which erroneously stated that "NEPA requires that the Corps * * * mitigate [adverse environmental] effects to the greatest extent possible" (Pet. App. 42a), expressly rejected respondents' argument that the *Elk Creek Supplemental Statement* gave insufficient attention to mitigation (Pet. App. 41a-42a).

If we are correct in our contentions that the court of appeals erred in respect to the agency's substantive and procedural requirements regarding mitigation and worst case analysis, and erred as well in respect to the duty to consider what respondents characterize as "significant" new information, then

As we explained in our opening brief (at 19), no one—including the government—has questioned that a federal agency can and should consider mitigation opportunities when assessing the environmental consequences of a proposed action. The crucial issue here is the role that mitigation considerations play in the agency's environmental review. We submit that NEPA (and the CEQ's implementing regulations) contemplate that the government will discuss mitigation in a manner that aids reasoned decisionmaking and, more specifically, that an agency "has broad discretion to determine the form and scope of the mitigation discussion in light of the particular circumstances, subject only to the requirements that the environmental review as a whole satisfies NEPA's specific requirements and that the resulting decision is not arbitrary or capricious" (*ibid.*). See *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98, 105-106. Respondents acknowledge that "the choice of how, or even whether, to mitigate is solely the agency's" (Resp. Br. 16), and they can point to nothing in NEPA or

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on remand the agency should be required to do no more than comply with the court of appeals' order that the agency provide further elaboration on the subject of cumulative impacts—an order from which we did not seek review in this Court. See Pet. Br. 15 n.6, 45 n.5. Respondents insist that we overread the court of appeals' opinion on the first two matters. We do not think so, but if the court of appeals may be understood as intending no novel and onerous obligations in respect to mitigation and worst case analysis, then there is no basis for further proceedings in the court of appeals on those matters since we have clearly complied with the usual NEPA requirements, as we have shown in our opening brief and here. And if we read the court of appeals correctly, and our challenge to that court's view of the law is found by this Court to be correct, then there also appears no occasion for further proceedings in the court of appeals.

the CEQ regulations that prohibits the government from tailoring the scope of the mitigation discussion to the characteristics of the particular project.

Instead, as we explained in our opening brief (at 22 n.14), NEPA requires a "detailed" statement (42 U.S.C. 4332(2)(C)), but it does not require that every subsidiary issue in an environmental impact statement must be discussed in exhaustive detail. Likewise, the CEQ regulations require a discussion of mitigation at certain points in the preparation of the environmental impact statement (40 C.F.R. 1502.14, 1502.16), but they leave the agency with responsibility to determine the scope of that discussion in light of the CEQ's direction that they "prepar[e] analytic rather than encyclopedic * * * statements," "discuss[] only briefly issues other than significant ones," and "emphasiz[e] the portions of the * * * statement that are useful to decisionmakers and the public" (40 C.F.R. 1500.4).

Respondents' contention that the *Elk Creek Supplemental Statement*'s mitigation discussion is inadequate rests wholly on their repeated assertions that the Corps "represented that there would be no adverse environmental consequences for wildlife" (Resp. Br. 13) and "relie[d] on mitigation to compensate for the environmental consequences of [the] proposed action" (*id.* at 17; see also *id.* at 13, 14, 16-17). But those statements incorrectly portray the *Elk Creek Supplemental Statement*'s actual content and the Corps' actual decision. The *Elk Creek Supplemental Statement* did not promise that a mitigation plan would eliminate the project's adverse impacts on wildlife. Instead, the *Supplemental Statement* identified the wildlife species that would be affected, and further noted that a wildlife mitigation plan "would reduce" the impacts upon two specific species: deer

and quail.[5] As the Record of Decision indicates (Pet. App. 57a), the Corps ultimately elected to develop a mitigation plan, but its decision to go forward with the project was not contingent on either the adoption or the success of that plan. As the Corps later explained, it decided to proceed with the project based on an environmental impact statement that "assumed the maximum level of adverse effects to wildlife" (*id.* at 61a), and it elected to implement a $350,000 wild-

[5] The *Supplemental Statement* explained that construction of the Elk Creek Reservoir would inundate 1,290 acres of wildlife habitat and would adversely affect resident mammals and game birds (*id.* at 26-27, 38). It stated (at 26) that approximately 50 deer and 17 elk had been observed in the project area. It also identified (at 26-27) other wildlife that could be present in the project area on a transient or permanent basis—including possibly 2 mountain lions, 12 black bear, 10 grey foxes, 20 coyote, 6 bobcat, 35 raccoon, 20 skunks, 6 mink, 6 river otter, 2 weasels, and 125 quail, as well as other bird populations. It further noted (at 27) that no threatened or endangered species was found to exist in the project area. The *Supplemental Statement* estimated (at 26) that the project would ultimately affect perhaps 100 deer and a lesser number of elk, and respondents' own wildlife expert concurred in this assessment, estimating that the inundation would decrease Jackson County's deer population—which numbers more than 100,000—by approximately 50 animals, and would displace—but not reduce—the 60 elk that were believed to live part-time in the reservoir area. See Pet. Br. 21 n.16. The *Elk Creek Supplemental Statement* further indicated (at 38) that a mitigation plan "would reduce" the project's impact on deer and quail, but that "all the other species of mammals would experience population reductions." Thus, respondents are incorrect in contending that the Corps "represented that there would be no adverse environmental consequences for wildlife" (Resp. Br. 13). The *Elk Creek Supplemental Statement* indicated that the project would have adverse wildlife impacts, but—as the quantitative estimates of respondents' own wildlife expert confirmed—those impacts would be relatively small.

life mitigation plan as a supplemental measure to "lessen the extent of wildlife impacts" (*ibid.*). The Corps, in short, complied with not only the letter but the spirit of NEPA by incorporating environmental mitigation measures as a prudent and responsible course of action, *even though* they were not necessary to render the project environmentally acceptable. This is precisely the type of agency attitude that NEPA was intended to encourage.[6]

Respondents' fact-based challenge to the *Elk Creek Supplemental Statement*'s discussion of wildlife mitigation is, in sum, unpersuasive. The discussion was appropriately tailored in relation to the severity of the environmental effects at issue and the likely importance that mitigation reasonably could be expected to play in the decision under consideration. See *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) ("The scope of the agency's inquiries must remain manageable if NEPA's goal of 'insur[ing] a fully informed and well-considered decision'" * * * is to be accom-

[6] Respondents' argument that the Corps "relied" on the institution of a mitigation plan to conclude that the project is environmentally acceptable is not only unsupported by the Record of Decision, it is also quite far-fetched on the actual facts of this case. Respondents portray the project site as a veritable wildlife refuge. In fact, the project area (which previously had been in part privately owned ranch land) assumed much of its value as wildlife habitat *after* the Corps' "acquisition of the reservoir site and removal of all developments in the area" (*Elk Creek Supplemental Statement* 26). Even thereafter, the project area has supported relatively small populations of common wildlife (*id.* at 26-27). Thus, respondents' basic premise—specifically, that the Corps' decision to go forward with the $97 million Elk Creek Project necessarily turned on the success of a mitigation plan directed primarily toward protecting some 125 quail and 50 deer (see note 5, *supra*)—is unreasonable on its face.

plished.") (citation omitted). Moreover, respondents' position would penalize the Corps for taking the environmentally responsible action of electing to develop wildlife mitigation measures over and above what was necessary to make the project environmentally acceptable.

3. The government's opening brief explained (at 26-35) that the court of appeals also erred in nullifying the CEQ's carefully deliberated regulatory revision of the so-called "worst case" regulation. Here, again, respondents attempt to avoid the question that prompted the government to seek this Court's review.[7] To the extent that respondents attempt to defend the court of appeals' actual reasoning, their arguments are unpersuasive.

The court of appeals held that the *Elk Creek Supplemental Statement* revealed uncertainty concerning Elk Creek's contribution to the total turbidity of the Rogue River and that the Corps therefore must conduct a "worst case" analysis of that matter, even though the regulation that specified that methodology has since been rescinded and replaced by a regulation setting forth an alternative methodology (Pet. App. 14a). The court specifically stated that the worst case regulation was a "codification of prior NEPA case

[7] The government specifically petitioned this Court to decide whether NEPA "requires federal agencies to include in each environmental impact statement * * * a 'worst case' analysis of potential environmental harm if relevant information is unavailable or too costly to obtain" (Pet. I). As the government's petition explained (at 15-18), the court's improper refusal to give effect to the CEQ's rescission of the worst case regulation would result in federal agencies' conducting wasteful and time-consuming inquiries into potential environmental effects under a methodology that, as the CEQ has stated, produces "pure conjecture * * * lacking a credible scientific basis" (50 Fed. Reg. 32,236 (1985)).

law" and that "the rules embodied in that regulation remain in effect even though the regulation was rescinded" (*id.* at 14a n.8). The court also specified that on remand the Corps must conduct a worst case analysis or conduct further research (*id.* at 15a). In short, the court nullified the CEQ's regulatory amendment and required the Corps to comply with the rescinded regulation.[8]

[8] Amicus Center for Environmental Education (CEE) incorrectly contends that the court of appeals' requirement that the Corps conduct a worst case analysis "does not belong before this Court" (Amicus Br. 4). CEE notes (*id.* at 5-6) that the amended regulation is applicable to "all environmental impact statements for which a Notice of Intent * * * is published in the *Federal Register* on or after May 27, 1986" (40 C.F.R. 1502.22(c)). CEE then argues that "the document under review * * * was prepared well in advance of the effective date" and that "[b]y the terms of the amended regulation the original regulation applies" (CEE Amicus Br. 8). CEE neglects to note that the amended regulation further provides that "[f]or environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation" (40 C.F.R. 1502.22(c)). Thus, if an environmental impact statement was begun before May 27, 1986, but remains "in progress" after that date, the preparing agency, at its option, may employ either regulation. Here, the *Elk Creek Statement* remains "in progress"—regardless of this Court's action—because the Corps must revise and amend it to comply with the court of appeals' order (see Pet. Br. 45 n.45; see also note 4, *supra*). Thus, the amended regulation would give the Corps the option of evaluating uncertainty through the methodology set forth in the original *or* in the amended regulation. The court of appeals, however, denied the Corps that option and unequivocally commanded the agency to use the worst case methodology set forth in the original regulation. See Pet. App. 14a & n.8, 15a. The court of appeals thus nullified the effect of the amended regulation here, as well as in future cases, and the issue is properly before this Court.

Respondents assert that NEPA itself requires agencies to "include 'worst' as well as 'best' case scenarios" in projecting potential environmental consequences (Resp. Br. 19-20 (footnote omitted)). NEPA, however, nowhere speaks in terms of "best" and "worst" cases; instead, it requires the agency to discuss "the environmental impact of the proposed action" (42 U.S.C. 4332(2)(C)(i)). The lower courts have recognized that an agency's discussion of the proposed action's environmental impact should include an acknowledgement of gaps in scientific information and reasonable forecasting of probable environmental consequences. See Pet. Br. 31-33. But there is no statutory requirement—or logical justification—for requiring an agency to discuss the "best" and "worst" scenarios. The CEQ has rightly concluded that polar forecasts—whether based on the best *or* the worst case—are not an effective method for evaluating environmental impacts. The methodology inevitably leads to "pure conjecture" that "is *not* useful to either the decisionmaker or the public" (50 Fed. Reg. 32,236 (1985) (emphasis in original)).[9]

[9] Respondents' sole support for the use of "best" and "worst" case scenarios is a 1981 CEQ commentary stating that the government should "present to the fullest extent possible the spectrum of consequences that may result from agency decisions" (46 Fed. Reg. 18,026, 18,032 (1981)). The CEQ withdrew that commentary in 1986. 51 Fed. Reg. 15,618. In any event, the commentary, which the CEQ provided to assist federal agencies in their compliance with the *worst case* regulation, provides scant support for respondents' statutory argument. Notably, respondents fail to grasp the point, set forth in our brief (at 31-33), that the worst case regulation was the CEQ's initial mechanism for achieving certain judicially recognized NEPA objectives—namely, to assure that agencies engage in reasonable forecasting of future environmental effects and take into account uncertainty—and that the worst case methodology is not the only allowable mechanism for effecting those general goals. See Resp. Br. 21 n.13. Furthermore, respondents offer no standard to judge whether a supposed worst case is, in Shakespeare's words, " 'at the worst' " (Pet. Br. 29 n.22).

Respondents' related argument—that the CEQ's amended regulation is inadequate because it requires projection of future environmental effects be supported by " 'credible scientific evidence' " (Resp. Br. 22 n.14)—is untenable and, if accepted, would actually reduce the usefulness of environmental impact statements. Respondents' desire for analysis based upon nonscientific conjecture cannot be squared with NEPA's goal of improved governmental decisionmaking. As our opening brief explains (at 33), such inquiries are wasteful and time-consuming, they have no logical limits, and they fail to provide the decisionmaker and the public with useful information.[10]

4. As the government's opening brief explained (at 35-44), the court of appeals also erred in revers-

[10] Respondents incorrectly assert that "the CEQ has not articulated any reason for its amendment [of the worst case regulation] other than the administrative convenience of the agencies" (Resp. Br. 24). The CEQ explained in detail that the amendment was necessary because the worst case methodology "is an unsatisfactory approach to the analysis of potential consequences in the face of missing information" (50 Fed. Reg. 32,236 (1985)), it is unworkable because of the "limitless nature of the inquiry established by this requirement" (*ibid.*), and it "lacks defensible rationale" (*ibid.*). Respondents' assertion that worst case analysis is a "requirement" rather than "a 'methodology' or 'procedure' " (Resp. Br. 26) is a meaningless distinction. In any event, respondents err in asserting that "[t]here is no language in the opinion of the court of appeals imposing or suggesting a particular 'procedure' or 'methodology' " (*id.* at 27). The court of appeals clearly dictated that the Corps must follow the "rules embodied in the [original] regulation" when conducting a worst case analysis (Pet. App. 14a n.8).

ing the district court's determination that the Corps adequately considered new information concerning environmental effects that was presented after the completion of the *Elk Creek Supplemental Statement*. Respondents fail to offer persuasive support for either the court of appeals' standard of review or the court's ultimate decision.

The parties agree (Pet. Br. 36 n.30; Resp. Br. 30) that the agency must prepare a supplemental environmental impact statement if the agency determines that the new information has "significant" relevance or bearing on the proposed action or its effects. See 33 C.F.R. 230.11(b) (Corps NEPA regulations); 40 C.F.R. 1502.9(c)(1)(ii) (CEQ regulations).[11] The agency's determination of this matter proceeds upon the so-called "rule of reason"—a phrase that expresses the agency's responsibility to assess the new information pragmatically in light of its value in the decisionmaking process. See, *e.g.*, *Cuomo* v. *United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Friends of the River* v. *FERC*, 720 F.2d 93, 109 (D.C. Cir. 1983).

A *court's review* of the agency's decision, however, is governed by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* A reviewing court may not set aside an agency's decision to forgo preparation or supplementation of an environmental impact statement unless the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). See, *e.g.*, *Wisconsin* v. *Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984). There is no statutory basis for the Ninth Circuit's less deferential "reasonableness" standard. Indeed,

[11] For the Court's convenience, we have reprinted relevant portions of these regulations in the Addendum to this brief.

respondents themselves offer only equivocal support for the Ninth Circuit's test.[12]

Respondents are fundamentally mistaken in contending (at 29) that an agency's evaluation of whether new information is significant is not entitled to deference because it "does not * * * involve a determination requiring 'a high level of technical expertise,' nor is it one which must be 'left to the informed discretion of the responsible federal agencies' " (quoting Pet. Br. 36, which in turn quotes *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976)). The Corps' decision

[12] Respondents (Br. 29-32) and their amici (Environmental Defense Fund Amicus Br. 26) seem to suggest that an agency's environmental decisions should receive more exacting scrutiny than other agency decisions, but that argument finds no basis in law and simply reflects those parties' own priorities. Respondents ultimately concede (at 32) that the APA Section 706(2)(A) standard applies when a court reviews an agency's decision to forgo supplementation, but they contend (at 34) that only the Seventh Circuit employs the "arbitrary or capricious" component of that standard in this context. Respondents reach that result, however, by excluding those circuits (the D.C., Second, and Fourth Circuits) that have held that the "arbitrary or capricious" test is applicable in reviewing an agency's decision to forgo preparation of a statement in the first instance. See Pet. Br. 37. As the Seventh Circuit has explained (*Wisconsin*, 745 F.2d at 417), the same standard should apply in either case. Respondents' reliance (at 33) on *Cuomo*, *supra*, to support the Ninth Circuit's reasonableness standard is misplaced; as noted above, that case recognized that the *agency* applies a rule of reason test (772 F.2d at 974) and the case, in any event, could not overrule the D.C. Circuit's previous decision in *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears* v. *Peterson*, 685 F.2d 678, 681, 685 (D.C. Cir. 1982). Finally, respondents' suggestion that the court of appeals actually invalidated the Corps' decision because it was conducted " 'without observance of procedure required by law' " (Resp. Br. 33, quoting 5 U.S.C. 706(2)(D)) finds no support in the court's opinion.

whether to supplement further the *Elk Creek Supplemental Statement* turned upon its technical evaluation of new scientific information. "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co.*, 462 U.S. at 103. Indeed, respondents' lengthy recitation of flawed and incomplete scientific assertions bears this out.

Respondents first contend (Br. 35-45) that the *ODFW Report*—a Corps-funded state agency study that addressed the effects of the Lost Creek Dam on fisheries resources—provided significant new environmental information. But as the district court noted, respondents actually sought relief based on the *Cramer Memorandum*, an unofficial memorandum by two ODFW biologists that expressed concern, based on the draft *ODFW Report*, that the Elk Creek Dam could adversely affect fisheries. See Pet. Br. 9 n.4. The *Cramer Memorandum* (which is reproduced at Pet. Br. Add. 3a-6a) is the only document that extrapolates the *ODFW Report* to Elk Creek. In addition, it is the *Cramer Memorandum*—and not the *ODFW Report*—that mentions turbidity and anglers' concerns.

Respondents made no effort to put this information before the Corps until *after* they filed suit. They first produced the *Cramer Memorandum*—an unofficial internal document—in their brief in support of a motion for a temporary restraining order. See Pet. Br. 9 n.4. They nevertheless criticize the Corps for failing to respond to the *Cramer Memorandum* and its extrapolation of the *ODFW Report* "until three months after the commencement of this case" (Resp. Br. 38). Furthermore, they now attempt to establish their claim that the Corps neglected to consider new

information by relying on scientific assertions contained in trial depositions and affidavits (*id.* at 36, 37, 39, 40, 42, 43, 44, 45) that were prepared *after* this suit was filed. In short, respondents have sued the Corps for failing to address information that was not made available to the agency until trial.

As this Court explained in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-555 (1978), NEPA litigants are not entitled to sue first and create the cause of action later.[13] In any event, the information that respondents cite is not sufficiently meaningful or reliable to justify the preparation of another supplemental environmental impact statement. As our opening brief explained (at 39-42), the *Cramer Memorandum* is, on its face, a brief, cursory, and conclusory statement of dubious scientific worth. It relies upon, and extrapolates from, the author's own *ODFW Report*, which has been seriously criticized by both the Corps and independent experts.[14] As the Corps' *Elk Creek SIR* explained, the *ODFW Report*'s mathematical model on fry survival was questionable and the Corps' own experiments indicated that operation

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[13] Here, as in *Vermont Yankee*, "to characterize the action of the [agency] as 'arbitrary or capricious' in light of the facts then available to it * * * is to deprive those words of any meaning" (435 U.S. at 554).

[14] As Judge Wallace explained (Pet. App. 22a-23a), the experts were overwhelmingly critical of the *ODFW Report*'s scientific validity. See Pet. Br. 41 n.40. Respondents note (Br. 38-39) that the experts and the Corps did not criticize *every* aspect of the *Report*, but that fact hardly validates a document that the experts described as containing considerable "statistical inaccuracies, over-extension of statistical methods, undue biological speculation" and that was "not likely to yield conclusive results" (Pet. App. 22a-23a). See Pet. Br. 41 n.40.

of the multiport intake tower could ameliorate temperature impacts (Pet. Br. Add. 9a-10a).[15] Furthermore, neither the *Cramer Memorandum* nor the *ODFW Report* established a link betwen the construction of Lost Creek Dam and an outbreak of epizootics (Pet. Br. Add. 10a-11a).[16] In sum, respondents have failed to show that the Corps acted arbitrarily (or even unreasonably) in concluding that the *Cramer Memorandum* and the *ODFW Report* did not reveal significant new information.

The same is true with respect to the *SCS Report*.[17] Respondents contend that the government "conven-

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[15] Respondents' contention that *Elk Creek SIR* was "clearly framed only in terms of the significance of the *mathematical model*" (Resp. Br. 38 (emphasis in original)) is accordingly incorrect. Moreover, the *Cramer Memorandum* itself addressed fry survival primarily in terms of ODFW modeling attempts. Pet. Br. Add. 3a-4a. Respondents also fault the *Elk Creek SIR* for failing to discuss fry survival in terms of "genetic diversity" (Resp. Br. 39-40), but the *Cramer Memorandum* did not even raise that issue.

[16] Respondents contend—citing the *Cramer* trial deposition—that the tests used were not sufficiently sensitive; however, Cramer himself was unable to identify any more sensitive test. See *Cramer Deposition* 36-37. As for the *Cramer Memorandum*'s passing concerns about angling and turbidity, the *Elk Creek SIR* adequately addressed them (Pet. Br. Add. 11a-12a). Respondents state that the "ODFW wanted to conduct studies to evaluate [angling] but the Corps, which funded the ODFW studies that led to the concern, refused to fund additional studies" (Resp. Br. 45 (citing *Cramer Deposition* 32)). Cramer himself admitted, however, that he had not proposed any such studies (*Deposition* 32), nor are we aware of any ODFW requests *for* additional funding to pursue this subject.

[17] Respondents did not inform the Corps that they intended to rely on the *SCS Report* as "new information" until the time

iently ignore[s] the Corps' own use of soil characteristics to predict turbidity" (Resp. Br. 47). But as respondents themselves recognize (*id.* at 4), the Corps developed its turbidity projections primarily through computer simulation using the Corps' "WESTEX" model. In building a data base for the WESTEX simulation, the Corps took *water samples* and measured their actual sediment content; it did not rely on soil maps to determine turbidity. See *Elk Creek Supplemental Statement* 22, 33-34; *1974 Water Quality Report* 41-47, Figs. 8-9. The Corps was accordingly justified in concluding that the *SCS Report*'s soil maps did not provide significant new information.

5. At bottom, respondents fail to recognize that NEPA has important but limited objectives: it is designed to ensure that agencies consider the environmental effects of their actions and inform the public that they have taken environmental concerns into account in the decisionmaking process. *Baltimore Gas & Elec. Co.*, 462 U.S. at 97. As this Court has stated (*id.* at 100):

> Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the "hard look" be incorporated as part of the agency's process of deciding whether to pursue a particular federal action.

The Corps took that "hard look" here, and that is all that NEPA requires.

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of trial. As the trial transcript indicates (at 41), the government attorneys were not informed that the maps comprising the *SCS Report* would be used until they were marked for identification at trial.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed with instructions to remand the case to the agency for further proceedings.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1988

ADDENDUM

Council on Environmental Quality

40 C.F.R. 1502.9 Draft, final and supplemental statements.

* * * * *

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

* * * * *

Army Corps of Engineers, Dept. of the DOD

33 C.F.R. 230.11 Environmental impact statements (EIS).

* * * * *

(b) *Supplements.* A Supplement to the draft or final EIS on file will be prepared whenever significant impacts resulting from changes in the proposed plan or new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action as discussed in 40 CFR 1502.9(c). A supplement to a draft EIS will be prepared, filed and circulated in the same manner as a draft EIS and will be titled "Supplement I, Supplement II, etc.

* * * * *

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AMICUS CURIAE

BRIEF

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Nos. 87-1703 and 87-1704

In The

Supreme Court of the United States

October Term, 1987

F. DALE ROBERTSON, *et al.*,

Petitioners,

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,

Respondents.

JOHN O. MARSH, JR., *et al.*,

Petitioners,

v.

OREGON NATURAL RESOURCES COUNCIL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

This motion of Pacific Legal Foundation (PLF) to file the annexed amicus curiae brief is respectfully made pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by all parties in *Marsh v.*

Oregon Natural Resources Council, No. 87-1704. However, consent was granted only by the Solicitor General and Methow Recreation, Inc., in *F. Dale Robertson v. Methow Valley Citizens Council*, No. 87-1703. Copies of consent letters have been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondents, Methow Valley Citizens Council, *et al.*

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has litigated numerous public interest cases which involve environmental issues in general and the interpretation of the National Environmental Policy Act (NEPA) in particular. PLF policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board authorizes active PLF involvement in a case only when there is broad community support. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

NEED FOR ADDITIONAL ARGUMENT

On July 6, 1984, PLF petitioned the Council on Environmental Quality (CEQ) to modify the "worst case analysis" requirement for environmental impact statements at 40 C.F.R. § 1502.22 (1979). After a lengthy analysis of the issue which included public review, CEQ announced in the *Federal Register* on April 25, 1986, that it had repealed the requirement and promulgated a new

regulation for the disclosure in an environmental impact statement of incomplete or unavailable information. The new regulation modifying Section 1502.22 became effective on May 27, 1986, and was supported by considerable evidence in the record that the "worst case analysis" requirement is an unproductive and ineffective method of achieving the goals of NEPA, 51 Fed. Reg. 15,620 (1986).

PLF believes the appellate court's imposition of a "worst case analysis" requirement in the two instant cases, after CEQ had rescinded the requirement and established a new regulation in its place, sets a dangerous precedent for appellate court activism, undermines the entire federal regulatory scheme, and establishes undesirable public policy. The serious nature of this dangerous precedent needs to be fully addressed, and PLF's brief does so. PLF's policy perspective and NEPA litigation experience, along with its prior participation in the rulemaking change of the "worst case analysis" requirement, will provide the Court a valuable additional viewpoint.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed amicus curiae brief be granted.

DATED: August 10, 1988.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINIONS BELOW

The two opinions of the United States Court of Appeals are cited as *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), and *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489 (9th Cir. 1987).

STATEMENT OF THE CASE

Marsh v. Oregon Natural Resources Council involves the erection of a dam. In 1962, Congress authorized construction of three dams to control flooding of the Rogue River basin. Two of the dams are completed. The third, Elk Creek Dam, is not. Elk Creek is a tributary of Oregon's Rogue River. The Rogue River is designated as "wild and scenic" in the Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906, 16 U.S.C. § 1271.

Pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, the United States Army Corps of Engineers (Corps) published a final environmental impact statement (EIS) in 1971 analyzing the impacts of the Elk Creek project. After studying the projected effects of the dam on turbidity in the Rogue River, the Corps filed a draft

supplemental EIS. Construction of the dam was suspended until completion of further water quality studies.

The Corps filed a revised draft supplemental EIS in 1980 which included turbidity and temperature projections based on the Corps' own observations and computer simulation models. The Corps' analysis was criticized as inadequate by state and federal agencies. The Corps responded to the criticisms and published its final supplemental EIS.

Subsequently the Oregon Natural Resources Council (Council) sued the Corps in federal District Court to enjoin the construction of Elk Creek Dam. The Council argued that the final supplemental EIS was inadequate in several respects. The District Court, however, found the EIS adequate and denied relief. Upon appeal to the Ninth Circuit, the court held, among other things, that the Corps' assessment of turbidity in the Rogue River due to the Elk Creek Dam was subject to uncertainty and therefore required a "worst case analysis." The court rejected the Corps' argument that this requirement ceased to apply when the "worst case analysis" regulation was rescinded on May 27, 1986. In Footnote 8 of its opinion the court referred to its own prior decision in *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984), and held the "worst case analysis" requirement remains in effect as a matter of case law.

In *Robertson v. Methow Valley Citizens Council*, Methow Recreation, Inc., applied to the United States Forest Service for a special use permit to develop and operate a year-round ski resort on the eastern side of the North Cascade Mountains in the State of Washington.

The proposed development is known as the Early Winters Project and would be located on Sandy Butte, a 3,900 acre parcel in the Okanogan National Forest, and on a large adjacent private parcel. Sandy Butte overlooks Methow Valley which provides winter range for Washington's largest migratory deer herd.

The United States Forest Service filed a final EIS in 1984 analyzing the impacts of designating Sandy Butte for use as a major ski area. Based on the EIS a special use permit was issued to Methow Recreation, Inc., for the Early Winters Project.

In December, 1985, Methow Valley Citizens Council filed suit in the Oregon District Court alleging, among others, violations of NEPA, due to an alleged inadequate EIS. The District Court upheld the adequacy of the EIS and the issuance of the special use permit. Methow Valley Citizens Council subsequently appealed to the Ninth Circuit. The appellate court reversed the District Court decision and ruled the EIS was inadequate. One of the deficiencies noted by the appellate court was the lack of a "worst case analysis." Citing its decision in *Marsh v. Oregon Natural Resources Council*, the court held that notwithstanding the fact that the Council on Environmental Quality (CEQ) had repealed the requirement for a "worst case analysis" one still must be provided in the face of incomplete information. In this case, the "worst case analysis" would be required on the impact of future development of Sandy Butte on the deer herds' migration route.

SUMMARY OF THE ARGUMENT

NEPA common law unquestionably requires that gaps in information or uncertainty be addressed in an EIS. The cases which preceded CEQ's "worst case analysis" regulation did not specify a particular method for achieving this goal, however. It was only in deference to CEQ's regulation that courts began to require a "worst case analysis." After considerable experience with federal agencies' attempts to comply with the "worst case analysis" requirement, CEQ recognized that the regulation, as implemented, did not further the goals of NEPA. Accordingly, after appropriate rulemaking, CEQ amended its regulations and eliminated the "worst case analysis" requirement. The Ninth Circuit, however, ignored the fact that the "worst case analysis" requirement was strictly a creation of CEQ, one which CEQ could and did eliminate. Instead, it misconstrued the case law and found it to require the "worst case analysis" as a specific methodology for addressing both gaps in information and uncertainty.

When CEQ promulgated its innovative "worst case analysis" regulation in 1979 NEPA case law only required that decision makers weigh the costs of proceeding without more and better information by means of (1) reasonable forecasting, and (2) consideration of probabilities of the occurrence of environmental effects. The new CEQ regulation, which replaced the "worst case analysis" rule, meets these criteria. It directs the agency to evaluate all reasonably foreseeable significant adverse effects including those catastrophic impacts of low probability.

This Court has consistently required the lower courts to give "substantial deference" to CEQ's interpretation

of NEPA yet the Ninth Circuit has refused to follow this principle. Without any support in the statutory language, the legislative history, or the case law, the appellate court has mandated a "worst case analysis" method of uncertainty assessment in the EIS process. Such activist court decisions introduce uncertainty into the rulemaking process, invite litigation, and perpetuate a wasteful use of resources.

ARGUMENT

I

CEQ'S REVOCATION OF ITS "WORST CASE ANALYSIS" REQUIREMENT RECOGNIZED THAT NEPA'S GOALS WERE NOT BEING ADEQUATELY SERVED

NEPA was signed into law by President Nixon on January 1, 1970. It articulated national policy and goals, established CEQ, and required all federal agencies to assess the environmental impact of major federal actions significantly affecting the quality of the environment. A combination of agency practice, judicial decisions, and CEQ guidance resulted in the development of an environmental impact assessment process comprised of, among other things, the preparation of EISs for certain types of federal actions.

In 1977, CEQ was directed by Executive Order 11991 to promulgate binding regulations implementing the procedural provisions of NEPA. Specifically, CEQ was directed to

> "'make the environmental impact statement more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives.'"

Accordingly, CEQ promulgated NEPA regulations on November 29, 1978. 40 C.F.R. §§ 1500-1508. The regulations became effective and binding on all federal agencies on November 30, 1979.

Since promulgation of the NEPA regulations, CEQ has periodically reviewed the regulations to identify areas where further interpretation or guidance is required. In recent years, CEQ received numerous requests from both government agencies and private parties to review 40 C.F.R. § 1502.22—the regulation describing the kind of analysis required in the EIS process when there is "incomplete or unavailable information." That regulation read:

> "§ 1502 Incomplete or unavailable information.
>
> "When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.
>
> "(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> "(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among

> alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (*e.g.*, the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence." 40 C.F.R. § 1502.22.

On August 11, 1983, CEQ proposed guidelines for the "worst case analysis" regulation and asked for comments. 48 Fed. Reg. 36,486 (1983). Some commenters advocated an amendment to the regulation. After reviewing the comments, CEQ withdrew its proposed guidance. 49 Fed. Reg. 4,803 (1984). On December 31, 1984, CEQ issued an Advance Notice of Proposed Rulemaking for 40 C.F.R. § 1502.22, solicited comments, and stated it would consider the need to amend the regulation. 49 Fed. Reg. 50,744.

On March 18, 1985, CEQ held a public hearing to discuss comments to the Advance Notice of Proposed Rulemaking. On August 9, 1985, CEQ reported its findings and proposed to amend the regulation. CEQ received 161 comments on the Advance Notice of Proposed Rulemaking: 68 from business and industry, 33 from public interest groups, 23 from federal agencies, 19 from individuals, 16 from state governments, and 2 from congressional interests. Many commenters "thought that either the regulation itself or recent judicial decisions from the U.S. Court of Appeals for the Ninth Circuit required

agencies to go beyond the 'rule of reason.'" 50 Fed. Reg. 32,236 (1985).

After a review of the regulation and the comments, CEQ concluded that the "worst case analysis" requirement was unsatisfactory. In its discussion of problems with the original regulation CEQ cited comments from experts in the field of risk analysis who stated that the "worst case analysis" lacks defensible rationale or procedures, and that the current regulatory language stands " 'without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty. It is, therefore, not surprising that no one knows how to do a worst case analysis. . .', Slovic, P., February 1, 1985, Response to ANPRM." 50 Fed. Reg. 32,236.

CEQ cited further problems with judicial interpretation of the "worst case analysis" requirement and specifically referenced the opinion of the Ninth Circuit in *Save Our Ecosystems v. Clark*, 747 F.2d 1240. In that case the Bureau of Land Management was ordered to prepare a "worst case analysis" assuming a causal effect between the use of certain herbicides on federal forest land and the development of cancer in human beings, despite the agency's contention that such an analysis would be pure guesswork because no credible scientific data supported the suggestion that cancer could occur at any dose. 50 Fed. Reg. 32,236.

Ultimately, CEQ concluded that the "worst case analysis," as interpreted by the courts, imposed a requirement on the agencies which went beyond the "rule of reason" because it required analysis of the "worst"

imaginable hypotheticals without regard to support from scientific opinion, evidence, or experience. For these reasons, CEQ repealed the "worst case analysis" regulation and replaced it with "a better approach." 50 Fed. Reg. 32,237.

> "[I]n our judgment, the proposed regulation is better designed to lead to more informed decisionmaking, and, thus, will be more helpful in preventing . . . low probability/high consequence disasters than the current 'worst case' rule. By requiring agencies to focus their analysis on reasonably foreseeable impacts, the proposal will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision. This will, we believe, constitute a substantial step forward over the current 'worst case analysis' approach." 50 Fed. Reg. 32,237.

II

PRIOR NEPA CASE LAW DID NOT REQUIRE A "WORST CASE ANALYSIS"

The Ninth Circuit misconstrued earlier NEPA decisions when it held, in the present cases, that the "worst case analysis" requirement of 40 C.F.R. § 1502.22 was a codification of prior NEPA case law. NEPA common law required only the adequate consideration of incomplete or unavailable information. It did not require the exact analysis detailed in the repealed CEQ regulation.

The appellate court relied on its own opinion in *Save Our Ecosystems* for the conclusion that the "worst case analysis" requirement was not new but rather a codification of prior case law. The holding in that case was ultimately predicated on *Sierra Club v. Sigler*, 695 F.2d 957

(5th Cir. 1983). A careful reading of *Sigler*, however, reveals a holding which does not support the conclusion of the Ninth Circuit in the instant cases. The *Sigler* court found that (1) prior case law required uncertainties to be addressed in environmental impact statements and (2) CEQ *could* require a "worst case analysis." But, contrary to the Ninth Circuit, the Fifth Circuit did not find that the "worst case analysis" regulation was the only method CEQ could impose to address incomplete or unavailable information.

The appellate court in *Sigler* traced the evolution of NEPA's common law on the issue of uncertainty and cited *State of Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir. 1978), as indicating the state of the case law just prior to the promulgation of CEQ's "worst case analysis" regulation:

> "One of the costs that must be weighed by decisionmakers is the cost of uncertainty—*i.e.*, the costs of proceeding without more and better information. Where that cost has been considered, and where the responsible decisionmaker has decided that it is outweighed by the benefits of proceeding with the project without further delay, the courts may not substitute their judgment for that of the decisionmaker and insist that the project be delayed while more information is sought." *State of Alaska*, 580 F.2d at 473-74.

According to *Sigler* (the case ultimately relied upon by the Ninth Circuit) the federal cases which predated the 1979 "worst case analysis" regulation interpreted NEPA to require what could be termed an "uncertainty analysis," not a "worst case analysis." This Court should not be misled, as was seemingly the Ninth Circuit, by the fact that *Sigler* imposed a "worst case analysis" requirement on the United States Army Corps of Engineers. In

that case, the Corps argued that the catastrophic "worst case" oil spill analysis mandated by the regulation, involving a total cargo loss of a supertanker in Galveston Bay, was beyond the statutory minima of NEPA and therefore need not be performed. The *Sigler* court, therefore, focused on the question of whether the CEQ "worst case analysis" regulation was a permissible interpretation of NEPA. That court did not even try to address the question, answered in these cases affirmatively by the Ninth Circuit, whether a "worst case analysis" requirement is mandated by the statute.

When it published its decision on April 25, 1986, to rescind the "worst case analysis" regulation, CEQ responded to comments on the rule change, gave its own interpretation of the prior case law, and specifically cited *Sigler*.

> *"Comment*: Case law required worst case analysis prior to adoption of 40 CFR 1502.22.
>
> *"Response*: This assertion is incorrect. Case law prior to the adoption of 40 CFR 1502.22 *did* require agencies to make a 'good faith effort . . . to describe the reasonably foreseeable environmental impact(s)' of the proposal and alternatives to the proposal in the face of incomplete or unavailable information, consistent with the 'rule of reason.' *Scientists' Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). The 'worst case analysis' requirement was a technique adopted by CEQ as a means of achieving the goals enunciated in such case law. The 'worst case' requirement itself, however, was clearly a 'major innovation'. Comment, *New Rules for the NEPA Process: CEQ Establishes Uniform Procedures to Improve Implementation*, 9 Envt'l L.Rep. 10,005, 10,008 (1979). The U.S. Court of Appeals for the Fifth Circuit, interpreting the 'worst

> case analysis' requirement for the first time in a litigation context, recognized that it was an innovation of CEQ. *Sierra Club v. Sigler,* 695 F.2d 957, 972 (5th Cir. 1983). CEQ has since observed difficulties with the technique of 'worst case analysis' and is replacing it with a better approach to the problem of incomplete or unavailable information in an EIS." 51 Fed. Reg. 15,625 (1986) (emphasis in original).

It is clear that CEQ did not interpret the case law to require a "worst case analysis" when it promulgated the requirement in 1979. Nor did CEQ consider itself to have contradicted the case law when, in 1986, it replaced the "worst case analysis" with a better approach to the problem of uncertainty. It is equally clear that the *Sigler* court did not interpet the *case law* to require a "worst case analysis." *Sigler* cannot be read, as the Ninth Circuit does, to suggest that the "worst case analysis" requirement is a mere codification of prior case law when *Sigler* expressly referenced the requirement as an "innovation."

The "worst case analysis" is only a means to an end. It is not the end itself. To the extent that the "worst case analysis" is a codification of prior case law, it embodies the common law concept of "uncertainty analysis." But, it is only *a* method, *a* technique, for implementing the concept. CEQ has promulgated a new approach. The Court of Appeals for the Ninth Circuit should not be allowed to impose its own method of "uncertainty analysis" on federal agencies based on such an obvious misconception of the case law.

III

THE NEW CEQ REGULATION TRACKS PRIOR NEPA CASE LAW

After noting that NEPA is silent on the problem of uncertainty resulting from missing information, the Fifth Circuit summarized in *Sigler* the early NEPA case law on the issue of incomplete or unavailable data and revealed two elements essential to an uncertainty analysis:

> "'[O]ne of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. *Reasonable forecasting* and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry." "The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible • • • ." But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to the "fullest extent possible." '
>
> "*Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 481 F.2d 1079, 1092 (D.C.Cir.1973) (footnotes omitted). The EIS also must consider the *probabilities of the occurrence* of any environmental effects it discusses when it evaluates their environmental impact. *E.g., Carolina Environmental Study Group v. United States,* 510 F.2d 796, 799 (D.C.Cir.1975)." *Sigler,* 695 F.2d at 970 (emphasis added).

According to *Sigler,* the prior NEPA case law required the issue of uncertainty to be addressed with

(1) "reasonable forecasting" and (2) a consideration of the "probabilities of occurrence" of environmental effects. There can be no doubt that the new CEQ regulation meets these criteria. It reads in pertinent part:

> "§ 1502.22. *Incomplete or unavailable information.*
>
> "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
>
> "(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> "(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purpose of this section, 'reasonably foreseeable' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." 40 C.F.R. §§ 1502.22(a) and 1502.22(b) (emphasis added).

This new regulation, which replaced the "worst case analysis," clearly meets the standard established by prior NEPA case law as noted by *Sigler*. "Reasonable forecasting" is required by the regulations' mandate that an agency evaluate "reasonably foreseeable" significant adverse effects on the human environment. The requirement to consider the "probabilities of occurrence" is necessarily inferred from the language of the regulation which defines "reasonably foreseeable" to include, among others, catastrophic impacts even if their "probability of occurrence" is low.

To the extent that CEQ regulations must comport with prior NEPA case law, the current regulation does so. Title 40 Code of Federal Regulations § 1502.22 tracks NEPA common law and orders that uncertain impacts from missing information be assessed by means of reasonable forecasting and consideration of the probabilities of occurrence, and not by any "worst case analysis."

IV

THE NINTH CIRCUIT DID NOT GIVE SUBSTANTIAL DEFERENCE TO CEQ'S NEW REGULATION

In *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), this Court unanimously declared that "CEQ's interpretation of NEPA is entitled to substantial deference." This standard was acknowledged and applied by the Ninth Circuit as long as CEQ's "worst case analysis" requirement

was in effect: "These [CEQ] regulations are binding on the BLM and entitled to substantial deference by the courts." *Save Our Ecosystems*, 747 F.2d at 1244. After CEQ repealed the "worst case analysis" requirement and replaced it with a new regulation, however, the Ninth Circuit refused to give it the deference the court previously determined was due.

In the present cases, the appellate court refused to defer to the new 40 C.F.R. § 1502.22 regulation, on incomplete or unavailable information, in any respect. Rather, the court dismissed the new regulation out of hand for a supposed conflict with prior NEPA case law.

> "We reject the argument of the Corps that section 1502.22 is inapplicable due to its rescission on May 27, 1986. The worst case regulation is a codification of prior NEPA case law. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir.1984). Thus, the rules embodied in the regulation remain in effect even though the regulation was rescinded." *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489, 1497 n.8 (9th Cir. 1987).

In *Sigler*, the Fifth Circuit cited language from *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 371, 381 (1969), to indicate what substantial deference means in the context of NEPA: "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." The court went on to say, "[t]herefore, if the CEQ interprets NEPA as mandating a particular . . . analysis, the CEQ's interpretation is binding on this court and on agencies preparing EIS's unless it is shown that the interpretation conflicts with the language or legislative intent of NEPA or the teachings of the Supreme Court." *Sigler*, 695 F.2d at 972.

The Ninth Circuit, in the present cases, pointed to no compelling indications that the new regulation is wrong. The court concluded, without discussion, that the "worst case analysis" requirement applied as a matter of law and the new regulation did not. It has been shown that this conclusion was based on an egregious misreading of the applicable case law. Had the Ninth Circuit included within its analysis of the new regulation an assessment of the language and legislative intent of NEPA, as well as the teachings of the Supreme Court, as suggested by *Sigler*, it would have been compelled to defer to CEQ's interpretation of the statute.

In *Sigler*, the Fifth Circuit examined the language of the statute and found that "NEPA is silent on the problem of uncertainty resulting from missing information. . . ." *Sigler*, 695 F.2d at 970. The court held that NEPA's "literal language does not require a worst case analysis." *Id.* at 969. The court permitted itself to conclude only that "[w]e perceive some language in NEPA which *may* be said to endorse *generally* the *concept* of a worst case analysis. *See* 42 U.S.C. § 4331(b)(3) (responsibility of federal government to avoid 'unintended' consequences of environmental use), 4332(C) (EIS to disclose all environmental impacts)." *Id.* at 969 (emphasis added). The Fifth Circuit found no NEPA mandate for a "worst case analysis." Nor did it find NEPA to preclude any other analysis which would meet the goal of NEPA to avoid unintended consequences and address environmental impacts. Clearly, the new regulation, which directs the disclosure and analysis of incomplete or unavailable

information relevant to all reasonably foreseeable significant impacts, meets these goals and may be said to be endorsed, generally, by NEPA.

With respect to the legislative intent of NEPA the *Sigler* court notes the following.

> "There is also some support for a worst case analysis in NEPA's legislative history which illustrates congressional awareness of man's limited understanding of the environmental consequences of his actions. *See* Senate Comm. on Interior and Insular Affairs, National Environmental Policy Act of 1969, S. Rep. No. 296, 91st Cong., 1st Sess. 9-10 (1969). Despite this awareness, Congress mandated full disclosure of environmental consequences, apparently leaving to the courts and the CEQ the determination of the extent of the mandate when information is missing and expensive, or impossible, to obtain." *Id.* at 970 n.9.

Just as a critical review of the prior case law reveals a distinction between NEPA's mandate for uncertainty assessment and the "worst case analysis" *method* of assessment, so does the legislative history make the difference apparent. The only support the *Sigler* court found in the legislative history, for the "worst case analysis," was the reference to "congressional awareness of man's limited understanding." It found no support for mandating a "worst case analysis" methodology. As *Sigler* points out, Congress mandated disclosure by a means which could be selected by CEQ. In 1979 CEQ chose the "worst case analysis" method for assessing missing information. In 1986 CEQ chose, in its own words, "a better approach to the problem of incomplete or unavailable information in an EIS." 51 Fed. Reg. 15,625.

This is not the first time this Court has had to decide whether to defer to CEQ's change in regulations. In the *Andrus* case, CEQ was changing its guidelines to require a "worst case analysis" for the first time. This Court concluded that a change in interpretation by CEQ is no reason to decline to defer to its new interpretation. Likewise, in the present cases, when CEQ has changed its regulations once again, this time to eliminate the "worst case analysis" requirement, this Court should not decline to defer to the new regulation.

The new 40 C.F.R. § 1502.22 regulation does not conflict with the language of NEPA. It does not conflict with the legislative intent. Nor does it conflict with the teachings of the Supreme Court. These conclusions should bind the Ninth Circuit to apply the CEQ regulation as it now stands and to dismiss its self-imposed requirement for a "worst case analysis" in an EIS.

V

THE NINTH CIRCUIT'S ARROGATION OF RULEMAKING AUTHORITY UNDERMINES THE ENTIRE FEDERAL REGULATORY SCHEME

If the Ninth Circuit is permitted to apply its own EIS rules rather than those properly promulgated by the responsible regulatory agency, and if it is permitted to do so in open contravention of NEPA case law, statutory language, and congressional intent, it will undermine not only the NEPA regulatory program but the entire federal regulatory scheme. In *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), this Court chose not to accept such a risk. In that case, the Court of Appeals had devised its own four part "balancing" test for determining when

an agency must begin an EIS. After noting that the "balancing" test found no support in either the language or legislative history of NEPA, this Court indicated that "the statute clearly states when an impact statement is required, and mentions nothing about a balancing of factors." This Court went on to suggest several more reasons why it could not adopt the appellate court's test: (1) It would leave the agencies uncertain as to their procedural duties; (2) it would invite litigation; and (3) it would result in the preparation of a good many unnecessary impact statements.

Unless this Court rejects the Ninth Circuit's unfounded conclusion that NEPA mandates a "worst case analysis" and no other, the same inevitable problems foreseen in *Kleppe* can be anticipated to result with equal certainty from the present cases. Federal agencies could not rely on federal rules with any assurance if federal courts were allowed to rewrite them whenever the courts determined the rules did not go as far as the courts wanted them to. It would invite considerable litigation in many areas of the law if the regulated community perceived that courts can set their own rules contrary to those established by the responsible agencies through the proper rulemaking process. Also, a good many unnecessary studies would be done with considerable expense and delay to comply with the "worst case analysis" requirement in an EIS.

It is bad law and poor public policy that allows the courts to displace agency regulations without compelling indications that the regulations are wrong. In the present cases the Ninth Circuit made no such showing. The court

has foisted its own ideas on the regulated community with flagrant disregard for the decisions of the federal agency which is designated to interpret national environmental policy and directed to promulgate binding regulations under NEPA.

CONCLUSION

This Court should not permit the Ninth Circuit to displace properly enacted interpretive rules with its own conception of national environmental policy. It is against the public interest for the courts to circumvent the well considered decisions of the administrative agency and to continue to apply annulled rules which have been demonstrated to be counterproductive to the goals of the overriding statute. For the reasons stated above, this Court should rule for petitioners.

DATED: August, 1988.

Respectfully submitted,

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BRIEF

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No. 87-1703, 87-1704

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, *et al.*,
Appellants,

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,
Appellees.

JOHN O. MARSH JR., SECRETARY OF THE ARMY, *et al.*,
Appellant,

v.

THE OREGON NATURAL RESOURCES, COUNCIL, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE INSTITUTE OF LAW AND PUBLIC HEALTH PROTECTION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE INSTITUTE OF LAW AND PUBLIC HEALTH PROTECTION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF *AMICUS*

The Institute of Law and Public Health Protection (Institute) is a non-profit corporation organized under the laws of the Commonwealth of Virginia. The Institute is devoted to the attainment of adequate protection of public health and the environment in the United States and throughout the world. Its officers, directors and members include prominent legal educators in the United States, Europe, Africa, Asia and

Australia, State and Federal officials, medical and health care experts, and corporate executives concerned with effective environmental and health protection regulation. To these ends, the Institute is concerned with environmental and public health policy, the reform and improvement of substantive environmental law, the proper enforcement of such law by the responsible governmental entities, and with the nature of the federal courts' review of governmental decisions. When permitted by court rules and practice, the Institute files briefs as *amicus curiae* in litigation involving significant public health and environmental law issues.

The case at bar involves questions fundamental to the effective implementation of the National Environmental Policy Act (NEPA), a statute having significant importance in the protection of the environment. These issues include:

1. Whether, under the Constitution, the President, absent delegation of any authority by Congress, has inherent legislative power to authorize the Council on Environmental Quality (CEQ) by means of an executive order to promulgate legally binding legislative-type rules, *i.e.* the CEQ Regulations, 40 C.F.R. Parts 1500-1508 (July 1, 1986);

2. Whether Congress when it enacted the NEPA intended to establish and impose a requirement for "worst case analysis" upon federal decision makers, and if not, whether federal courts may lawfully "create" such a requirement based upon the "common law" of the NEPA.

Through their counsel, the parties to these proceedings have consented to the appearance of this Amicus.

SUMMARY OF ARGUMENT

If the President does not have the power either (1) under the Constitution or (2) by virtue of authority delegated by Congress to authorize the CEQ to promulgate legally binding legislative type rules, then the CEQ Regulations For Implementing The Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. Parts 1500-1508, are not valid and the "worst case analysis" regulation (Section 1502.22) was not legally binding or enforceable, and the

judicial decisions based thereon and specifically the decisions of the Court of Appeals for the Ninth Circuit in the cases at bar must be reversed.

There are only two possible sources for the power that President Carter purported to exercise when on May 24, 1977, he issued Executive Order 11991 to empower the CEQ to promulgate these regulations. One source is the Congress. Article I, Section 1, provides that "All legislative powers herein granted shall be vested in a Congress ... ." But, as shown hereafter in Part I, in none of the legislation upon which the President purported to base Executive Order 11991 did Congress authorize the President or delegate legislative power either directly or indirectly to the President or the CEQ to promulgate legislative type regulations to implement the procedural provisions of the NEPA.

The other possible source of legal authority for Executive Order 11991 and the CEQ Regulations is the Constitution itself -- either some explicit grant of power to the President or some implied authority inherent in the Constitutional powers granted to the Executive Branch. As shown hereafter in Part II, there is no such explicit grant of power to the President in the Constitution and the inherent authority of the President to administer the Executive Branch and to "take Care that the Laws be faithfully executed ..." pursuant to Article II, Section 3 of the Constitution, falls short of constituting implied power adequate to authorize the CEQ to promulgate binding legislative type rules to implement the NEPA.

Absent either statutory delegation or constitutional power to support Executive Order 11991, it has no legal effect, *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), and the CEQ Regulations promulgated under the authority of the Executive Order therefore do not have any binding effect.

Finally, assuming *arguendo* that this Court concludes that Congress has acquiesced by silence and/or inactivity to the presidential exercise of legislative authority in Executive Order 11991, the scope of that Authority cannot in any event exceed the scope of the NEPA itself and the CEQ regulations cannot

lawfully impose requirements that exceed the provisions of the NEPA. As shown hereafter in Part III, there is no statutory basis for the "worst case analysis" regulation. Accordingly, the regulation, and its successor, are *ultra vires*, void and unenforceable.

ARGUMENT

I
CONGRESS HAS NOT DELEGATED AUTHORITY TO THE PRESIDENT EMPOWERING HIM TO AUTHORIZE THE CEQ TO PROMULGATE BINDING LEGISLATIVE TYPE RULES TO GOVERN IMPLEMENTATION OF THE PROCEDURAL PROVISIONS OF NEPA.

The preamble to Executive Order 11991 states the claimed legal basis upon which it was promulgated:

> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4371 *et seq.*), and Section 309 of the Clean Air Act, as amended (42 U.S.C. 1857h-7), it is hereby ordered as follows ...

None of the statutes enumerated in this preamble delegated authority to the President to authorize the CEQ to promulgate legally binding legislative type regulations to govern the implementation of the procedural provisions of the NEPA.

A. The National Environmental Policy Act Of 1969

The Council on Environmental Quality (CEQ), created by the provisions of Title II of the NEPA, was intended to act in an advisory not regulatory capacity. The CEQ was patterned

closely upon the Council of Economic Advisors established by the Full Employment Act of 1946. U.S. Congress, National Environmental Policy Act of 1969, Senate Committee Report 91-296, July 9, 1969. Congress stopped short of granting any authority to the CEQ to control or veto the activities of other agencies.

In fact, Congress expressly considered and rejected grant of such authority to the CEQ. Congress rejected the original version of Section 102(2)(B), which would have provided for CEQ "review and approval" of federal agency methods for giving "appropriate consideration to presently unquantified environmental amenities and values." Instead Congress substituted the weakened requirement for mere agency "consultation" with the CEQ.

The limited advisory powers Congress intended for the CEQ are indicated by Section 202 of the NEPA which provides that the President shall designate as members of the CEQ persons who as a result of training, experience, and attainments, are:

> ...exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in Title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and *recommend* national policies to promote the improvement of the quality of the environment.

Emphasis added.

Section 204 of the NEPA lists the eight specific duties and functions that Congress empowered the CEQ to perform. These duties and functions are confined, *inter alia*, to advising the President, to gathering "timely and authoritative information concerning conditions and trends in the quality of the environment," to conducting "investigations, studies, surveys, research and analysis relating to ecological systems and environmental quality" for the purpose of reporting "at least

once each year to the President on the state and condition of the environment," and to "*advise* " and "make *recommendations* to the President ... " on the environment. (*Emphasis added.*) Thus, both the language of the NEPA and its legislative history clearly establish that Congress did not intend the CEQ to be a regulatory agency. *See* Conf Rep No. 91-765, 91st Cong., 1st Sess., *reprinted in* 1969 U.S. Code Cong. & Admin. News, 2771-2773. Congress delegated no regulatory authority whatsoever to the CEQ in the NEPA:

> The purpose of the bill, as hereby reported, is to create a Council on Environmental Quality with a broad and independent overview of current and long-term trends in the quality of our national environment, to *advise* the President and through him the Congress, and the American People on steps which *may and should* be taken to improve the quality of that environment.

House Report No. 91-378, *to accompany* H.R. 12549, p. 1, July 11, 1969. (*Emphasis added.*)

B. The Environmental Quality Improvement Act

Congress enacted the Environmental Quality Improvement Act of 1970, 42 U.S.C. 4371-4374, 1970, (EQIA), to create within the Executive Office of the President an Office of Environmental Quality (Office). This legislation did not delegate any regulatory authority or authorize either the CEQ or the Office to promulgate binding legislative type rules to implement the NEPA. The EQIA merely created the Office to "provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190 [NEPA]." Section 203(d) of the EQIA enumerates the seven specific functions and duties of the Office. These duties and functions are confined, *inter alia*, to providing "professional and administrative staff and support" for the CEQ, to reviewing the "adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources," to promoting "the advancement of

scientific knowledge ... to prevent or reduce adverse effects that endanger the health and well-being of man ... ," and to "collecting, collating, analyzing and interpreting data ... ." Moreover, the power of the Office and the CEQ in dealing with "Federal agencies and departments" is explicitly confined by this legislation to "assisting" such agencies in various environmental activities. § 203(d)(2).

C. The Clean Air Act, Section 309

Section 309 of the Clean Air Act, 42 U.S.C. Section 7609 (1970), does not delegate *any* authority to the CEQ. Section 309 directs the Administrator of the Environmental Protection Agency (EPA) to "review and comment in writing on the environmental impact ... " of proposed Federal legislation, of newly authorized Federal projects to which Section 102(2)(c) of NEPA applies, and regulations proposed by any department or agency of the Federal government. The sole reference to the CEQ is set forth in Section 309(b) which provides that matters that EPA finds "unsatisfactory" shall be "referred to the Council on Environmental Quality."

Because of the limitations of the above statutory provisions, President Nixon, by Executive Order No. 11514, 3 C.F.R. § 902 (1970), authorized and directed the CEQ to adopt and publish "guidelines" to assist Federal agencies in the preparation of adequate environmental impact statements (EISs). Based on this executive order "Interim Guidelines" were published in 1970, 35 Fed. Reg. 7391 (1970), and "Guidelines" in 1971, 36 Fed. Reg. 7724 (1971). Thereafter, the CEQ published a later version as "Proposed Guidelines," 38 Fed. Reg. 10856 (1973), which led to the "Final Guidelines," 38 Fed. Reg. 20550 (1973). These Guidelines did not claim to be binding, but purported merely to provide guidance to assist federal agencies to comply with Section 102(2)(C) of NEPA (42 U.S.C. § 4332(2)(C)), the provisions governing preparation of environmental impact statements. Some courts accorded "persuasive" authority to the Guidelines. *See, e.g., Scientists' Institute for Public Information* v. *Atomic Energy Commission*, 481 F.2d 1079, 1088 (D.C. Cir. 1973). This Court referred to the Guidelines as "nonbinding" in *Andrus* v. *Sierra Club*, 442 U.S. 347, 353, n.10 (1979),

and ruled they were merely "advisory in nature." *Id.* at 356-357.

Subsequently, President Carter, by Executive Order No. 11991, 3 C.F.R. § 124 (1978), directed the CEQ to transform these non-binding, advisory Guidelines into binding legislative type regulations. These regulations were issued on November 29, 1978. 43 Fed. Reg. 55990, (1978), codified at 40 C.F.R. Parts 1500-1508.

These "regulations" purport to be "applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended ... ." 40 C.F.R. Part 1500.3. The CEQ claims that these "regulations" derive legal authority from the following:

> These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to Sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of Section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law.

Id.

It is clear from the foregoing analysis that none of the legislation relied upon as the legal basis for President Carter's Executive Order 11991 and the legal basis for the CEQ regulations constitutes delegation by Congress of authority to empower the CEQ to promulgate legally binding, legislative type rules governing implementation of NEPA. If such authority exists it must be found in the President's authority

under the Constitution, not in the legislation enacted by Congress.

II
THE PRESIDENT DOES NOT HAVE EITHER EXPLICIT OR INHERENT POWER UNDER THE CONSTITUTION TO AUTHORIZE THE CEQ TO PROMULGATE BINDING, LEGISLATIVE TYPE RULES TO GOVERN IMPLEMENTATION OF THE PROCEDURAL PROVISIONS OF THE NEPA

Apart from the statutes discussed above, President Carter also based Executive Order 11991 upon the power vested by the Constitution in the Office of the President of the United States.

A. Explicit Constitutional Authority

Since Article I, Section 1, provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States ... " it is not surprising that Article II contains no explicit grant of legislative power to the President. Article II provides in Section 1 that "[t]he executive Power shall be vested in a President of the United States ... ," in Section 2 that "[t]he President shall be Commander in Chief ... ," that he exercise a miscellany of powers pertaining to foreign relations of the United States, and various powers of appointment of officials. The only stated power of the President in the Constitution that can conceivably be treated as providing some basis for legislative authority is the "take Care" clause in Article II, Section 3, which imposes upon the President the duty to "take Care that the Laws [enacted by Congress] be faithfully executed." Apart from this clause, it is clear that nothing in Article II or elsewhere in the Constitution vests legislative authority in the President to transform the CEQ into a regulatory agency by delegating power (which Congress withheld) to promulgate legally binding legislative type regulations governing implementation of NEPA. Thus any such authority for Executive Order 11991, if it exists at all, must be inferred from the "take Care" clause.

B. Inherent Constitutional Authority

Article II, Section 1, reposes all executive power in a single chief executive: "[t]he executive Power shall be vested in a President of the United States ... " who is charged in Section 3 with the responsibility to "take Care that the Laws be faithfully executed." The President is also empowered to appoint the officers in the Executive Branch (with the advice and consent of the Senate) and require these officers to report to him so that he can determine whether the laws are being "faithfully executed," a requirement that implies the right to confer with these officers. This constitutional system implies, at a minimum, the power of the President to maintain operational oversight, supervision, and management of the administrative process of the Executive Branch.

This Court in a series of major constitutional decisions has addressed various aspects of the scope of the President's implied powers. That the exclusive power and responsibility to execute the law implies the power to remove subordinate officials without the consent of Congress was settled in *Myers* v. *United States*, 272 U.S. 52 (1926). *Myers* also held that the President possessed the power to "supervise and guide" subordinate officials in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Id.* at 135. Under the *Myers* view of presidential power, this broad role as supervisor of the execution of the laws (derived from the "take Care" clause) can only be narrowed by an express provision by Congress that prohibits the President from overruling or revising a subordinate officer's interpretation of his statutory duty in a particular instance. The claim is that absent such express prohibition by Congress this supervisory power over subordinates (such as the CEQ) is unrestricted.

However, this expansive interpretation of Presidential power was narrowed by subsequent decisions. *See Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) and *Weiner* v. *United States*, 357 U.S. 349 (1958), which invalidated removal of officers of independent agencies who

had not acquiesced to presidential supervision and control. In *Humphrey's Executor* this Court distinguished between the President's authority over "executive functions," and the President's authority over agency functions that have quasi-legislative or quasi-judicial aspects. 295 U.S. at 628-629. The Court distinguished and narrowed the scope of *Myers* to "the narrow point actually decided," i.e., the President's power to dismiss a postmaster without Congressional consent. The Court expressly "disapproved" of any views in *Myers* which are "out of harmony with the views here set forth," *Id.* at 626, and went on to state, "the *Myers* case cannot be accepted as controlling here. A postmaster is an executive officer restricted to the performance of executive functions ... and hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive ... ." *Id* at 627. Thus, after *Humphrey's Executor*, presidential authority could not override, or dictate decisions to, agencies to which Congress had delegated either quasi-judicial or quasi-legislative functions.

Implicit in this decision is the older doctrine that the "take Care" clause does not convey power to the President to control the *interpretation* of law enacted by Congress. *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524 (1838). In *Kendall* the Court ruled:

> This is a doctrine that cannot receive the sanction of this Court. It would be vesting in the President a dispensatory power, which has no countenance for its support in any part of the Constitution and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with the Power entirely to control the legislation of Congress ... .

Id. at 612-613.

In *Kendall* the President was seeking to *change*, in the guise of "interpreting" the law, a statutory scheme for the payment of postal contracts. In a subsequent case, *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), Chief Justice Taney, sitting as a circuit judge, denied the power

of the President under the "take Care" clause to authorize the suspension of the writ of *habeas corpus*, a writ mandated by a statute enacted by Congress.

Thus, the Court in these Nineteenth Century cases precluded the President from wielding power under the "take Care" clause either to change or to abrogate legislative provisions enacted by Congress under the pretext of "interpreting" and enforcing the law. But the question remained whether the President may by executive order grant powers to a subordinate entity in the Executive Branch (such as the CEQ) which the Congress has not authorized or delegated.

The Court addressed this issue in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), which invalidated a presidential executive order that directed the Secretary of Commerce to seize and operate the steel mills during the Korean War in order to assure continued war production. The Court rejected the claim that the President, absent congressional authorization, had "inherent power" under the Constitution to issue the executive order authorizing the Secretary to seize and operate the industry.

> The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress - it directs that a presidential policy be executed in a manner prescribed by the President... . The Constitution does not subject this lawmaking power of Congress to presidential ... supervision or control.

Id. at 588 (Black, J., writing for the Majority of the Court).

Justice Jackson's famous concurring opinion noted that:

> Presidential powers are not fixed, but fluctuate, depending on their disjunction or conjunction with those of Congress ... . When the President takes measure incompatible with the expressed

> or implied will of Congress his power is at its lowest ebb ... .

Id. at 638.

Justice Jackson warned that a decision to sustain presidential power in such circumstances should be "scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.*

The instant cases at bar involve only a slight variation on the *Youngstown* theme. In *Youngstown*, the President sought by executive order to grant power, which Congress had withheld, to a subordinate (the Secretary of Commerce) to seize and operate the steel mills. In the instant case, the President by executive order sought to grant power, which Congress had withheld, to transform the CEQ into a regulatory agency with power to promulgate binding legislative type rules to enforce the NEPA.

In one sense the instant case involves a less justifiable arrogation of power by the President than was the case in *Youngstown*. *Youngstown* involved a national emergency and the dissenting justices, who would have upheld the executive order, relied upon a series of national emergency cases in which presidential action without prior congressional authorization had been upheld, e.g., President Lincoln's issuance of the Emancipation Proclamation without statutory authority. *The Prize Cases*, 67 U.S. (2 Black) 635 (1865). The Carter Executive Order 11991 does not purport to be based upon or justified by the existence of a national emergency.

C. The Effect of Congressional Silence

Indisputably, in the period subsequent to President Carter's promulgation of Executive Order 11991 and the CEQ's promulgation of its "Regulations," Congress has not repudiated these exercises of undelegated legislative authority. Does congressional silence constitute congressional consent?

Several decisions of the Court are suggestive but none appear to be wholly on point. In *TVA* v. *Hill*, 437 U.S. 153

(1978), where Congress recognized that completion of the Tellico Dam would result in inundation and destruction of the critical habitat of an endangered species in violation of the Endangered Species Act, this Court refused to construe repeated congressional appropriations of funds explicitly earmarked to complete the Tellico Dam, as amounting to congressional consent or acquiescence, *sub silentio*, to an implied exception to the Endangered Species Act.

Similarly, the Court declined to find Congress had ratified security clearance provisions promulgated by an executive branch official simply because Congress had failed to override them and continued to appropriate funds for the Agency:

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree that delegation has been shown here ... . Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Greene v. *McElroy*, 360 U.S. 474, 506-507 (1959).

Both of the foregoing decisions suggest that the silence of Congress does not necessarily mean consent. To hold otherwise would place Congress in the invidious position of having constantly to review the conduct of the multifarious agencies within the Executive Branch to ferret out and repudiate such excesses or otherwise be deemed to have ratified or acquiesced in them by silence and inaction.

The only context in which congressional acquiescence has been found in the failure of Congress to act has been the failure of Congress to modify or disapprove a "systematic, unbroken, executive practice" which pertains to uniquely executive branch functions such as the management of public lands. *See, United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

In the instant case, the conversion of an advisory council into a regulatory agency goes far beyond such ministerial activity as management of public lands. The silence of Congress in this case should not be deemed to be consent.

III.
THERE IS NO STATUTORY BASIS IN NEPA FOR THE "WORST CASE ANALYSIS" REGULATION

Even if the Court finds that Congress has acquiesced *sub silentio* to the transformation of the CEQ into a regulatory agency with power derived from Executive Order 11991 to promulgate regulations binding on all federal agencies for the implementation of the NEPA, the "worst case analysis" regulation (40 C.F.R. § 1502.22) is not authorized or supported by any provision in NEPA, is *ultra vires*, and hence void and unenforceable.

The Court has repeatedly declared unlawful any regulation that exceeds statutory authority:

> The power of an administrative officer or board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make law - for no such power can be delegated by Congress - but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Manhattan Gen. Equip. Co. v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1935) (citations omitted). *See also City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973), citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944)).

Justice Brandeis articulated this principle in *Campbell* v. *Galens Chemical Co.*, 281 U.S. 599, 610 (1930): "The limits of the power to issue regulations are well settled. They may

not extend a statute or modify its provisions." Citing *International Ry. Co.* v. *Davidson*, 257 U.S. 506, 514 (1922).

Even if Executive Order 11991 had undertaken to convey authority to create a "worst case analysis" requirement, it would be powerless to do so. The Court in *Cole* v. *Young*, 351 U.S. 536,557 (1956), squarely held that an executive order is impotent to add requirements not contained in the underlying legislation:

> The basis for our decision is simply that the standard prescribed by the Executive Order and applied by the Secretary is not in conformity with the Act.

These constraints upon arrogation of undelegated power have been specifically applied by this Court to NEPA cases: "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural," *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978), and "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Id.* at 548. "The procedural duty imposed upon agencies by [the action-forcing requirements of Section 102(2)(C)] is quite precise, and the role of the courts in enforcing that duty is similarly precise." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976).

As shown hereafter, despite these clear admonitions, various Courts of Appeal have seized upon the "worst case analysis" regulation and by dint of judicial legislation fleshed out a so called "common law" of NEPA requirement that is nowhere mandated or authorized by the statute.

A. The "Worst Case Analysis" Regulation

The origin of the worst case analysis regulation is obscure. It emerged for the first time in the 1978 CEQ Regulation, Section 1502.22. It did not appear in the Guidelines that preceded the Regulations. The first judicial analysis of this regulation occurred in *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir.), *reh'g den.*, 704 F.2d 1251 (5th Cir. 1983), in which the court, although admitting there was no

clear statutory basis in the NEPA for the regulation, extrapolated a basis from *dicta* found in three earlier NEPA decisions by the Court of Appeals for the District of Columbia: *Scientists' Inst. for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973); *Carolina Envtl. Study Group* v. *United States*, 510 F.2d 796 (D.C. Cir 1975); and *Alaska* v. *Andrus*, 580 F.2d 465 (D.C. Cir.), v*acated in non-pertinent part sub nom. Western Oil and Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978), and from CEQ policy releases entitled "Forty Most Asked Questions Concerning CEQ's NEPA Regulations" and "Talking Points on CEQ's Oversight of Agency Compliance with NEPA Regulations (1980)." Based on such foundations the Court in *Sigler* held, without supporting authority or analysis, that the "worst case analysis" rule was binding: "[i]t is well-established that the CEQ's regulations and its interpretation of them are binding on this court and on agencies preparing EISs." 695 F.2d at 972.

Despite early rejection of the validity of the concept of "worst case analysis" in the Ninth Circuit ("Everyone recognizes the catastrophic results of the failure of a dam; to detail these results [in an EIS] would serve no useful purpose." *Warm Springs Dam* v. *Gribble*, 621 F.2d at 1027 (1980)), after the Fifth Cicuit's decision in *Sigler*, that precedent was enthusiastically, if uncritically, adopted and expanded by the Ninth Circuit to apply not only to the Environmental Impact Statement (EIS), but to the less formal Environmental Assessment (EA), *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark*, 720 F.2d 1475 (9th Cir. 1983), (*SOCATS*) and applied retroactively to programs begun before the effective date of the regulation on July 30, 1978. *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240 (9th Cir. 1984). Although the Court of Appeals for the District of Columbia repudiated retroactive application of the regulations, it enthusiastically approved of *Sigler* in extensive *dicta*. *San Luis Obispo Mothers for Peace* v. *Nuclear Regulatory Commission*, 751 F.2d 1287, 1302 (D.C. Cir. 1984), *vacated on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985).

Alarmed by such judicial activism, on August 11, 1983, the CEQ published a "Clarification" of Section 1502.22, which repudiated the interpretation of its "worst case analysis" regulation as adopted by *Sigler*:

The obligation to prepare a worst case analysis, at bottom is nothing more than the duty to provide information essential to a reasoned choice among alternatives ... . Thus, a worst case analysis is required in those circumstances where significant adverse impacts are possible, and scientific uncertainties or gaps in available information exist regarding those impacts. This means that there is an initial threshhold of probability which must be crossed before Section 1502.22 comes into play. This threshold of probability is provided in Section 1502.8, whch defines the term "effects" to include those that are both direct and indirect, and are "reasonably foreseeable." Thus, an agency need only examine the reasonably foreseeable effects of its proposed action under any circumstances. Section 1502.22 is applied when an effect of a proposed federal action is reasonably foreseeable and the consequences of that effect cannot be ascertained because of scientific uncertainty or gaps in available knowledge... . Put another way, speculative information or potential adverse impacts with an extremely low probability of occurrence could not be considered "essential to a reasoned choice among alternatives," as used in Section 1502.22.

48 Fed. Reg. 36, 487 (1983).

When the CEQ "clarification" went unheeded, it was withdrawn and instead the CEQ instituted a rulemaking proceeding, Advanced Notice of Proposed Rulemaking, 49 Fed. Reg. 50,774 (1984), and thereafter rescinded Section 1502.22 and replaced it with the following regulation:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.
> (c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 C.F.R.1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact

statements in progress agencies may choose to comply with the requirements of either the original or amended regulation.

51 Fed. Reg. 15656 (April 25, 1986).

Rescission of the "worst case analysis" regulation reflected the widespread recognition that this construct was essentially bogus and lacked any substantive justification. The principal criticisms of the concept are discussed in the following section.

B. "Worst Case Analysis" Is Impermissibly Vague and Is Incapable of Objective Enforcement

1. *What Constitutes "Worst Case" Is Indefinable.*

There was no definition of "worst case" in Section 1502.22 and there are no objective criteria or standards to employ to establish consensus on a case-by-case basis as to what constitutes the "worst case" in any given decision-making process. In *Sigler*, the worst case was postulated by the Sierra Club which was an interested party committed to stopping the project under any circumstances. For tactical purposes, all Sierra Club needed to do was postulate any kind of worst case event other than that addressed in the Oil Spill Analysis which the Corps had conducted and included in the NEPA and the administrative records. Had the Corps included in its analysis the total cargo loss scenario postulated by the Sierra Club, it could have faulted the Corps' analysis for failure to consider a collision between two supertankers and the spill of two cargoes in the Galveston Channel. If the Corps had addressed the effects of a collision of two supertankers in its analysis, the Sierra Club could have postulated an additional participant in the collision such as a nuclear submarine, with the result that two supertanker cargoes plus radioactive debris were spilled into the environment. And so on, *ad infinitum*. The regulation was thus a prescription for subjective irrationality heavily skewed to favor anti-growth litigants.

2. *"What Constitutes Compliance with the "Worst Case Analysis" Requirement Is Unknowable.*

There is likewise no definition or objective criteria as to what methodology, assumptions, or procedures are mandated by the requirement to prepare a "worst case analysis." One consequence of this vagueness was demonstrated in *SOCATS* in which the Court had ordered remand to the agency to prepare a "worst case analysis" for the federal herbicide spraying program. When the analysis was completed and its sufficiency came up for review, the court found the analysis insufficient and ordered the agency to conduct an analysis along lines indicated by the court, i.e., to do a study of the environmental cost that would be incurred if everyone who could possibly be exposed to the herbicides developed cancer. Thus, as shown, *infra*, the amorphous nature of what constitutes adequate "worst case analysis" almost inevitably produces situations in which courts intrude impermissibly into agency decisionmaking.

3. *"Worst Case Analysis" Does Not Generate Reliable and Probative Data.*

Under the original CEQ regulation the duty to perform "worst case analysis" was triggered by the existence of "gaps" in available data pertaining to possible impacts that would result if a proposed decision were put into effect. But the performance of "worst case analysis" does not generate reliable and probative data to fill these gaps, and therefore does not provide a substantive substitute for the missing data. Instead, "worst case analysis" mandates the adoption of some drastic hypothesis and the generation of speculative data as to what environmental costs would result if the hypothetical event ever occurred. Thus, the court's ruling in *Sigler* that "worst case analysis" is necessary or even contributes to or facilitates "reasoned decisionmaking" is spurious.

4. There Are No Objective Criteria to Determine When Sufficient Uncertainty Exists to Trigger the Requirement to Prepare "Worst Case Analysis."

Every proposed action involves some uncertainty. As shown above, the number of possible worst case scenarios that may be adduced is limited only by the imagination of parties seeking to obstruct implemetation of the proposed federal decision. The same is true with respect to uncertainty. There are not only no objective criteria to tell decisionmakers and reviewing courts when there is sufficient uncertainty to trigger the requirement to prepare "worst case analysis," there are also no criteria to determine what uncertainty must be disclosed. What degree of certainty is sufficient to satisfy a reasonable mind is highly debatable and fraught with subjective value judgements.

C. The Intrinsic Vagueness of the "Worst Case" Construct Leads to Undue Judicial Intervention Into Environmental Decisionmaking.

Whenever the issue of scientific or technical uncertainty arises in federal decisionmaking, it transmutes into an issue of who has the power to make the ultimate substantive decision whether to implement the proposal. Does the agency created by Congress have the power or can the reviewing court, by faulting the agency's decisionmaking process, exercise a practical veto over the proposal or impose adoption of the alternative it prefers?

There can be little doubt that the NEPA and other environmental statutes have excited substantial judicial activism that has taken the form of substituting judicial solutions for those devised by the responsible agency. The frequency and degree of judicial usurpation of the agencies' decisionmaking role has prompted this Court on several occasions to overrule courts of appeal that have exceeded the bounds of permissible judicial review. In *Vermont Yankee* this Court rebuked the Court of Appeals for the District of Columbia for presuming to impose "appropriate" but nonstatutory procedures upon the Nuclear Regulatory Commission (NRC) to be used to conduct

its rulemaking. 435 U.S. 519. The Court also faulted the Court of Appeals because it "improperly intruded into the agency's decisionmaking process [on the substantive merits], making it necessary for us to reverse and remand with respect to this part of the case also." *Id.* at 525.

Subsequent to remand, the NRC repromulgated and somewhat modified the challenged rule, the so-called Table S-3 Rule, which thereafter became the subject of further court of appeals review on remand. This rule was a "generic" rule applying to all individual NRC licensing proceedings, consisting of a table of numerical values representing the environmental effects resulting from the uranium fuel cycle ranging from the "front-end" activity of producing the fuel, to the "back-end" activity of disposing of spent fuel. The court on remand focused on a single line in the Table that pertained to the "back-end" issue which postulated that each nuclear plant to be licensed by the NRC would produce eleven million curies of high level and transuranic radioactive wastes annually, and that these wastes would be buried in a permanent repository that would store them in a totally enclosed state. The effect of this computation in the Table thus postulated a zero-release assumption for a minimum of 250,000 years. *Natural Resources Defense Council v. NRC*, 685 F.2d 459, 500-01 (D.C. Cir. 1982). The effect of employing this assumption in the individual licensing proceedings would be expressed in the cost/benefit analysis as a zero-cost value.

The court of appeals addressed the issue of whether this computation in the Table violated the NEPA or was arbitrary and capricious under the pertinent APA standard for judicial review. The decision consisted of an opinion by each of the three judges participating on the panel. Judge Bazelon held that the rule violated both the NEPA and the APA, but upheld the NRC finding that the repository was economically feasible. Chief Judge Edwards from the Sixth Circuit agreed with Judge Bazelon that the rule violated the NEPA and the APA, but overruled the NRC feasibility ruling. *Id.* at 494-95. Judge Wilkey dissented from Judge Bazelon's holding that the rule violated the NEPA and the APA, but concurred in the finding of economic feasibility. Judge Bazelon's opinion was therefore the ruling of the court.

According to his opinion the rule violated the NEPA because there was some evidence in the record, which the NRC did not reject as invalid, which indicated that there was some uncertainty whether the waste could be stored in a totally enclosed manner for 250,000 years. By adopting the zero-release assumption Judge Bazelon held that the NRC violated the NEPA because it did not consider the uncertainty about the risk that the waste might be liberated, an "impact" that in his opinion the NEPA required to be considered, and that this "self-evident error in judgment" amounted to arbitrary and capricious action under the APA. *Id.* at 481. Judge Bazelon also faulted the application of the generic rule to cost-benefit analysis for individual licensings because to do so would violate a supposed NEPA requirement that environmental costs be considered and the NRC could not find the "environmental costs represented by the uncertainties to be zero unless their cost is, in fact, zero." *Id.* at 484. Thus, Judge Bazelon's decision was based upon the same principle as the CEQ regulation, i.e., it assumed a legal requirement to take uncertainty into account and attribute an environmental cost to it.

Judge Wilkey's dissent takes sharp exception to the manner and scope of Judge Bazelon's review. "If there ever was a doubt prior to today, it is now clear that this court is committed to an assumed role as high public protector of all that is good from the perceived evils of the nuclear age." *Id.* at 517. The theory of Judge Wilkey's criticism was that the majority substituted its judgment for that of the NRC and, ignoring the unequivocal command of *Vermont Yankee* to determine only whether the NRC rule was arbitrary and capricious under the APA, had instead substituted its own substantive conclusion. *Id.* at 545.

Thereafter, the Supreme Court in an unanimous decision reversed the court of appeals on the ground, *inter alia*, that Judge Bazelon's NEPA ruling was invalid and that the court had gone beyond its authority under the APA in reviewing agency decisionmaking under the NEPA. The Court held: "[a]dministrative decisions should be set aside in this context, as in every other, only for substantitve procedural or substantive reasons as mandated by statute ... not simply because the court is unhappy with the result achieved."

Baltimore Gas and Electric Co. v. *NRDC*, 462 U.S. 87, 97 (1983), *rev'd NRDC* v. *NRC*, 685 F.2d 459 (D.C. Cir. 1982) (quoting *Vermont Yankee*, 433 U.S. 519, 588 (1978)).

The Court also placed special emphasis on the need for exercising extreme deference when the problem of uncertainty is involved:

> [A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential. *See, e.g., Industrial Union Dept.* v. *American Petroleum Inst.* 448 U S. 607, 656 (1980) (plurality opinion); id. at 705-706 (Marshall, J. dissenting).

Id. at 103

This Court has made it abundantly clear that the only legally binding and enforceable requirements imposed by the NEPA "are those stated in the plain language of the Act ... ." *Vermont Yankee*, 433 U.S. at 548, and has repeatedly struck down a claimed NEPA "requirement" if "it is a creature of judicial cloth, not legislative cloth." *Weinberger* v. *Catholic Action of Hawaii Peace Educ. Project* 102 S. Ct. 197 (1981). Despite repeated rejection by this Court of efforts by activist courts to fabricate NEPA "requirements" that lack any statutory basis, the cases at bar involve just such an attempt. The root of this most recent fabrication of a non-statutory NEPA "requirement" is to be found in *Sigler* in which the court candidly acknowledged that NEPA's "literal language does not require a worst case analysis ... " 659 F.2d. at 969, but nevertheless proceeded to fabricate such a requirement based, *inter alia*, upon *dicta* in three earlier NEPA cases. In this fashion the NEPA's "common law" of "worst case analysis" was born out of nothingness. If, as conceded by the *Sigler* court, the literal language of the NEPA "does not require worst case analysis," there was nothing in the NEPA to vest any precedential value in the *dicta* of the earlier NEPA cases upon which *Sigler* relied and which purported to have been

"codified" in section 1502.22. Nothing plus nothing equals nothing, not a "common law" of NEPA requiring "worst case analysis," or a regulation that codifies these non-existent "authorities."

Despite the insubstantiality of the basis and origin of this strange construct, it has proven stubbornly vital. Not even the express rescission of the rule (section 1502.22) by the CEQ in 1986 daunted the panels of the Ninth Circuit which decided the cases at bar. In both cases at bar, the court rejected the argument by the Government that section 1502.22 is inapplicable because it was rescinded by the CEQ on May 27, 1986. In both cases the court bases its conclusion on the claim that "the worst case regulation is a codification of prior NEPA case law ... " and "[t]hus, the rules embodied in the regulation remain in effect even though the regulation was rescinded." 820 F.2d at 1058 n.8, 833 F.2d at 817 n.11. The cases cited in these footnotes are all cases that derive their "authority" from and are based upon *Sigler*. Thus, the entire edifice of precedent relied upon by the courts in the cases at bar are based entirely upon *Sigler*.

This Court has the opportunity to extirpate perhaps the most blatant attempt of all to engraft a requirement onto the NEPA which has no basis in the statute. This "worst case analysis" construct has insidiously pervaded the policies, practices and regulations of numerous agencies over the past several years and continues its attenuated existence in the form of individual agency rules that were originally adopted to comply with the CEQ regulation 1502.22. *See, e.g., Carolina* v. *Hudson*, 665 F.Supp. 428 (E.D.N.C. 1987), in which the district court held that despite the rescission by the CEQ of section 1502.22, the requirement continued to exist because the regulation of the U.S. Army Corps of Engineers (33 C.F.R. Parts 230, App. B-3)(1987) adopted by the Corps in order to comply with the CEQ regulation had not as yet been rescinded.

Accordingly, in order to eliminate the "worst case analysis" requirement in all its manifestations the Court should unequivocally rule that there is no legal basis in the NEPA for a "worst case analysis" requirement, and that any and all regulations requiring such analysis are void and unenforceable.

CONCLUSION

The arrogation of power manifest by the fabrication out of nothingness of a "worst case analysis" requirement is merely a specific manifestation of the more massive arrogation of power that took place when President Carter, without any Congressional authority, transformed the CEQ from an advisory panel into a regulatory agency claiming power to regulate all federal agency decisionmakers with respect to their NEPA obligations. It is respectfully submitted that the Court should declare the CEQ Regulations as a whole void and unenforceable.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 87-1704

In the Supreme Court

of the United States

OCTOBER TERM, 1987

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY, ET AL.,
Petitioners,

v.

OREGON NATURAL RESOURCES COUNCIL,
ET AL.,
Respondents.

BRIEF OF THE
NORTHWEST FOREST RESOURCE COUNCIL,
ASSOCIATED OREGON LOGGERS, DOUGLAS TIMBER
OPERATORS, HELICOPTER LOGGING ASSOCIATION,
NORTHWEST FORESTRY ASSOCIATION, NORTHWEST
INDEPENDENT FOREST MANUFACTURERS
ASSOCIATION, NORTH WEST TIMBER ASSOCIATION,
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ASSOCIATION AND WILLAMETTE TIMBERMEN, INC.
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement: (a) a fully developed plan to mitigate environmental harm; and (b) a "worst case" analysis of potential environmental harm if relevant information is unavailable or too costly to obtain.

2. Whether the Army Corps of Engineers was required to prepare a supplemental environmental impact statement because of new information presented after the completion of the environmental impact statement.

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BRIEF OF THE NORTHWEST FOREST RESOURCE COUNCIL, ASSOCIATED OREGON LOGGERS, DOUGLAS TIMBER OPERATORS, HELICOPTER LOGGING ASSOCIATION, NORTHWEST FORESTRY ASSOCIATION, NORTHWEST INDEPENDENT FOREST MANUFACTURERS ASSOCIATION, NORTH WEST TIMBER ASSOCIATION, SOUTHERN OREGON TIMBER INDUSTRIES ASSOCIATION, WASHINGTON CONTRACT LOGGERS ASSOCIATION, WESTERN WOOD PRODUCTS ASSOCIATION, WESTERN FOREST INDUSTRIES ASSOCIATION AND WILLAMETTE TIMBERMEN, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The Northwest Forest Resource Council ("NFRC") is a coalition of eleven trade associations which represent various segments of the forest products industry in the states of Oregon and Washington. These eleven trade associations are the Associated Oregon Loggers, Douglas Timber Operators, Helicopter Logging Association, Northwest Forestry Association, Northwest Independent Forest Manufacturers Association, North West Timber Association, Southern Oregon Timber Industries Association, Washington Contract Loggers Association, Western Wood Products Association, Western Forest Industries Association and Willamette Timbermen, Inc. Collectively, these associations represent the entire spectrum of the forest products industry in Oregon and Washington, from the dozens of small family-owned saw mills and logging companies to the largest publicly-held companies.

The forest products industry is the largest single employer in Oregon and Washington. The industry provides more than 75,000 direct jobs in Oregon and over 55,000 in Washington, which in turn generate an additional 350,000 or more indirect jobs in the two states.

In many parts of western Washington and southwestern Oregon, the forest products industry provides the backbone of the local economy. In many communities in these regions, a sawmill is the only major employer in town, and the fate of the community is tied inextricably to the future of the mill.

A unique and dominant feature of the forest products industry in Oregon and Washington is its dependence on the purchase of federal timber sold by the Forest Service of the United States Department of Agriculture and the Bureau of Land Management ("BLM") of the Department of the Interior from federally-owned lands in the two states. Most of the dozens of small family-owned companies located

in the western portion of both states own no private timberlands at all, and are largely or totally dependent on federal timber for the log supply to operate their mills. The larger companies also rely heavily on federal timber. The Forest Service currently sells between 4.5 and 5 billion board feet of timber per year from the 19 National Forests in Washington and Oregon, and the BLM sells more than one billion board feet of timber from its lands in the two states. This total constitutes 40 percent of the total annual timber production in the two states and over 10 percent of all the timber harvested annually in the United States.

The flow of federal timber has become the lifeblood of the economy of Oregon and Washington. As recently as August, 1988, the Forest Service found that "[a]pproximately 44 percent of Oregon's economy and 28 percent of Washington's economy are directly dependent on timber from National Forests." Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide at S-27 (August, 1988). (Forest Serv., U.S. Dep't of Agric. 1988).

The large and unalterable dependence of the forest products industry in Oregon and Washington on federal timber has given the NFRC, its constituent associations and the companies comprising the membership of these associations a vital and ongoing interest in the proper interpretation and application of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* (1988). Of necessity, as well as desire, forest products industry associations and companies regularly participate in the federal environmental planning procedures established by NEPA, including commenting on environmental impact statements and environmental assessments, working cooperatively with federal agencies to identify and resolve environmental issues and, at times, participating in administrative

and judicial proceedings to review federal agency compliance with NEPA.

The interest in NEPA held by the NFRC, its constituent associations and their members is not an abstract interest in procedural perfection, but a very practical interest in assuring that land and resource management decisions made by federal agencies can be fully implemented on a timely basis. Sawmills cannot operate on environmental impact statements; they need logs, and in Oregon and Washington that means logs supplied by the Forest Service and the BLM. If these federal agencies become paralyzed by the erroneous and unwarranted judicial application of never ending "procedural" requirements under NEPA, then these agencies can never promptly implement any decision. The result, inevitably, is that federal timber cannot be sold and harvested on an orderly and predictable basis, and sawmills cannot operate.

Amici's interest in these cases arises from a simple reality: unless NEPA is interpreted and applied to permit federal agencies to implement land and resource management decisions -- including the management and disposition of federal timber -- in a timely and reliable manner, the forest products industry in Oregon and Washington will cease to exist.

At present, the forest products industry is threatened by a long line of decisions by the United States Court of Appeals for the Ninth Circuit which have consistently misapplied and misinterpreted NEPA in a fundamental way. The result of this line of cases, of which the two cases under review here are merely the latest examples, is that the Ninth Circuit is increasingly making important natural resources policy decisions in the west through the means of the NEPA injunction.

The federal government is the dominant land owner in almost every state in the Ninth Circuit, and as a result,

land and resource management decisions in these states are federal agency decisions subject to NEPA. For this reason, NEPA has come to have a far more significant role in the natural resources planning of the western states than elsewhere in the country. The environmental impact statement or environmental assessment has become a common part of most natural resources planning decisions in the west. Foes of natural resources decisions have frequently used NEPA in the courts to contest federal agency decisions with which they were unhappy. The Ninth Circuit is where most of these cases end up.

The most common outcome of a Ninth Circuit NEPA case is the reversal of a district court and the issuance of an injunction against the challenged federal agency action. Both this case and *Robertson et al. v. Methow Valley Citizens Council et al.*, No. 87-1703 ("*Methow Valley*") are examples.

The frequency of these injunctions is, in part, a product of a peculiar principle the Ninth Circuit developed which presumed irreparable injury to follow from a federal agency's failure to prepare a proper environmental impact statement, and which made injunctive relief for a violation of NEPA virtually mandatory. In *Amoco Production Co. v. Village of Gambell, Alaska*, _____ U.S. _____, 107 S. Ct. 1396 (1987), this Court found that the Ninth Circuit's presumptive injunction rule for environmental cases had no basis in NEPA or the decisions of this Court, and unanimously reversed the Ninth Circuit. *Id.* at 1403-05, 1409-10 (Stevens, J. and Scalia, J., concurring on other grounds).

A year after that decision, the Ninth Circuit has only grudgingly acceded to this Court's ruling. As recently as March 1, 1988, a Ninth Circuit panel reversed a district court and issued a preliminary injunction against reconstruction of a logging road in Montana based

on the presumptive injunction rule rejected in *Amoco*. *Save the Yaak Committee v. Block*, No. 86-3808 (9th Cir. March 1, 1988), *withdrawn and amended*, 840 F.2d 714 (9th Cir. 1988). After the government petitioned for rehearing pointing out to the court that it had relied on a principle expressly rejected by this Court, the Ninth Circuit issued an "amended" opinion acknowledging the decision in *Amoco* but nonetheless ordering the very same injunction as in the original opinion. *Save the Yaak Committee*, 840 F.2d at 722.

The Ninth Circuit also ignored *Amoco* in *Northern Cheyenne Tribe v. Hodel*, 842 F.2d 224 (9th Cir. 1988). In that case, the court held, contrary to *Amoco*, that the financial interests of third parties could not be considered in determining whether a project should go forward. *Id.* at 229.

In *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190 (9th Cir. 1988), decided in April, 1988, the Ninth Circuit was unwilling to acknowledge that the holding in *Amoco* even *applies* to NEPA cases. *Id.* at 1195 (reversing district court and enjoining nine timber sales based on failure of U.S. Forest Service to consider cumulative impacts of sales in an environmental impact statement).

In short, the Ninth Circuit has not allowed *Amoco* to stand in the way of continuing to employ NEPA as a tool for blocking federal agency natural resources decisions with which judges of the Court are unhappy. Injunctions

in NEPA cases remain virtually automatic in the Ninth Circuit, irrespective of *Amoco*.[1]

Amici submit that the decisions of the Ninth Circuit which are under review in this case and case number 87-1703 are erroneous and should be reversed. These decisions represent precisely the kind of unwarranted and unsupportable misapplication of NEPA that so gravely threatens the future of the forest products industry in Oregon and Washington. For this reason, *amici* submit this brief to assist the Court in its resolution of these cases.[2]

STATEMENT OF THE CASE

Amici adopt the petitioners' statement of the case.

SUMMARY OF ARGUMENT

This case and the *Methow Valley* case are examples of the manner in which the Ninth Circuit increasingly makes natural resources decisions in disregard of agency determinations and Congressional mandates through the misapplication of NEPA. In *Methow Valley* the Ninth Circuit blocked the Early Winters Ski Resort development by

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[1]We by no means imply that every judge in the Ninth Circuit holds the view of NEPA described above. There is certainly a diversity of views among the judges of the circuit, and Ninth Circuit panels have (on occasion) found agencies to have complied with NEPA. However, the view criticized here is fairly attributable to a considerable segment of the sitting circuit judges.

[2]Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

finding in NEPA a previously nonexistent requirement for an agency to develop and implement a "complete mitigation plan" at the earliest stages of a complex development. In *Oregon Natural Resources Council* ("*ONRC*") (No. 87-1704), the Ninth Circuit applied the same requirement to enjoin construction of a dam which had been studied for a quarter century and specifically approved by Congress. The "complete mitigation plan" requirement does not exist in NEPA, and would have the effect of transforming NEPA from a procedural statute into a substantive environmental enactment requiring agencies to adopt "pro-environmental" alternatives for any proposed action.

In requiring the agencies to prepare a "worst case analysis" of both cases, the Ninth Circuit ignored, and effectively invalidated, the amended regulation issued by the Council on Environmental Quality in 1986, which eliminated the requirement for preparation of a worst case analysis in an environmental impact statement. The circuit court's imposition of a worst case analysis was invented out of whole cloth, and finds no support in NEPA or the CEQ regulations.

The Ninth Circuit applied an improper standard of review in deciding the "significant new information" claim in the *ONRC* case, and reached an obviously improper result. The court adopted a standard of review which required circuit judges to make *de novo* scientific judgments in disregard of the findings of both the agency and the district court. The proper standard of review was the "arbitrary and capricious" standard established by the Administrative Procedures Act. Had the court applied the proper standard, it would have been required to find that the two reports at issue did not require preparation of a third supplemental environmental impact statement, and did not permit issuance of an injunction against the project while the statement was being prepared. The Corps of

Engineers' judgment that the two reports do not require further environmental study was a reasonable judgment entitled to deference, and should have been upheld.

ARGUMENT

I. NEPA HAS NO REQUIREMENT FOR AN AGENCY TO PREPARE A COMPLETE MITIGATION PLAN IN AN ENVIRONMENTAL IMPACT STATEMENT; BY IMPOSING SUCH A REQUIREMENT, THE NINTH CIRCUIT HAS IMPROPERLY TRANSFORMED NEPA FROM A PROCEDURAL STATUTE INTO AN UNWORKABLE SUBSTANTIVE MANDATE.

This Court has consistently recognized that the effect of NEPA on federal agencies is "essentially procedural." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council. Inc.*, 435 U.S. 519, 558 (1978); *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 319 (1975) (NEPA creates "a discrete procedural obligation on Government Agencies . . . .") The Court has firmly rejected the contention that NEPA dictates what decisions a federal agency may make, as opposed to what procedures it must follow in making those decisions. *Id.*

The decision of the court below in this case and *Methow Valley*, requiring agencies to prepare a "complete mitigation plan" for every project, turns that fundamental principle on its head. In both cases, the lower court held that the agency must not merely discuss mitigation measures, but must actually adopt a course of action which implements significant mitigation measures. This interpretation of NEPA was a clear error of law.

The key holding of the Ninth Circuit in the *ONRC* case was as follows:

> As long as *significant measures are undertaken* to mitigate the project's effect, the measures need not compensate completely for adverse environmental impacts.

Petition for a Writ of Certiorari ("Pet.") at 5a. The court based this remarkable proposition on a single authority, *Friends of Endangered Species, Inc. v. Jantsen*, 760 F.2d 976 (9th Cir. 1985). Pet. at 5a. *Friends of Endangered Species* does not in any way support this holding. Rather, it states that where an agency has adopted mitigation measures which substantially eliminate the significant environmental impacts of proposed action, the agency need not prepare an environmental impact statement at all. *Friends of Endangered Species*, 760 F.2d at 987. It does not suggest that to satisfy NEPA, an agency must both develop and adopt a "complete mitigation plan." Such a requirement is completely at odds with the procedural nature of NEPA and the CEQ regulations. *See* 42 U.S.C. § 4332 (1988), 40 C.F.R. § 1502 (1987).

This Court rejected a similar attempt to transform NEPA into a substantive mandate in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980):

> *Vermont Yankee* cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of

> discretion of the executive as to the choice of the action to be taken."

Id. at 227-28. (Citations omitted).

We also agree with the Solicitor General in the *Methow Valley* case that, even from a procedural standpoint, the level of detail the lower court required in the "complete mitigation plan" at the very preliminary stage of development at which the Early Winters' Project stood at the time of the lawsuit was inappropriate and unjustified. Federal agencies cannot possibly develop a "complete mitigation plan" for projects still in such an early stage of development that all alternatives have not been considered and the ultimate contours of the project have not yet been determined. The unrealistic burden imposed by the circuit court effectively gives the courts veto power over every project. This result is flatly contrary to NEPA and the controlling decisions of this Court, and must be reversed.

II. THE DECISIONS OF THE CIRCUIT COURT EFFECTIVELY OVERRULED THE CEQ'S 1986 DECISION TO ELIMINATE THE WORST CASE ANALYSIS REQUIREMENT.

In 1978, the CEQ issued binding procedural regulations specifying how federal agencies were to prepare environmental impact statements under NEPA. 43 Fed. Reg. 55978 (1978). In those regulations was the requirement for an agency to prepare a "worst case analysis" when it was presented with scientific uncertainty. 43 Fed. Reg. at 55997. In 1986, the CEQ amended its regulations to eliminate this requirement. 51 Fed. Reg. 15618, 15620 (1986). In *ONRC*, the Ninth Circuit held that this amendment was meaningless and ineffective because "the worst case regulation is a codification of prior NEPA case law." Pet. at 14a, n.8.

The Ninth Circuit was wrong, and its cavalier disregard of the CEQ's regulatory action must be reversed. The only "NEPA case law" to which the court was referring consisted of prior Ninth Circuit cases which in turn mistakenly relied on the Fifth Circuit's decision in *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983). *Sigler* does not hold that a worst case analysis is mandated by NEPA, and none of the Ninth Circuit decisions parroting that proposition provide any substantive authority for that proposition.

The CEQ's 1986 regulatory amendment should be given effect. The CEQ found that the worst case analysis procedure was unwieldy and less effective than other alternate means. The CEQ obviously did not believe that the worst case analysis procedure was mandated by NEPA. Its interpretation of NEPA, the statute it was created to interpret and enforce, should be given substantial deference. *Chemical Mfrs. Ass'n v. Natural Resources Council, Inc.*, 470 U.S. 116 (1985).

III. THE NINTH CIRCUIT APPLIED AN INCORRECT STANDARD OF REVIEW AND MISINTERPRETED THE ADMINISTRATIVE AND DISTRICT COURT RECORD IN FINDING THAT TWO REPORTS REQUIRED AN INJUNCTION AGAINST COMPLETION OF THE ELK CREEK DAM PENDING PREPARATION OF A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT.

A. The Ninth Circuit Applied an Improper Standard of Review in Evaluating the "Significant New Information" Claim.

Because the command of NEPA to federal administrative agencies is "essentially procedural," *Vermont Yankee*, 435 U.S. 519, a court may not employ NEPA to alter the standard of review made applicable to administrative decisions by the Administrative Procedures Act (APA). 5 U.S.C. § 701 *et seq. (1988); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788-90 (1976); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973).

The dual commands of NEPA and the APA narrowly circumscribe the role of reviewing courts. That role is "simply to insure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas and Electric v. Natural Resources Defense Council*, 462 U.S. 87, 98-99 (1983). *See also Vermont Yankee*, 435 U.S. at 548 ("NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA.").

Under Section 706(2) of the APA, a court may set aside agency decisions, reached without a hearing, where the court finds that the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971). This "arbitrary and capricious" standard is well recognized as a limited and deferential one which supplies a presumption of validity and regularity to the administrative action. There is no requirement that reviewing courts be convinced that the agency's decision is correct; rather, the reviewing court need only conclude that the agency's action reflects "reasoned decisionmaking." *Baltimore Gas and Electric*, 462 U.S. at 105.

The circuit court decisions under review reflect only slight acknowledgment of, and absolutely no obedience to, these limitations. In these cases, the circuit court employed a standard of review which is at odds with this Court's decisions, NEPA and the APA.

In *ONRC*, the court of appeals determined that the Corps violated NEPA because it failed to prepare a *third* supplemental EIS considering two new reports completed after the second supplemental EIS.[3] The court concluded that the Corps' decision not to supplement the EIS failed a test of "reasonableness." This test, drawn by the court almost entirely from its own precedent, lacks any principled foundation.

The "reasonableness" test applied in *ONRC* was first applied in *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1022 (9th Cir. 1980) ("*Warm Springs*"), where the circuit court found that CEQ guidelines[4] for preparation of supplemental impact statements "do not in themselves provide a suitable standard for reviewing an agency's decision not to supplement an EIS in light of new information." To fill this perceived void, the court applied the "reasonableness" test applicable in the Ninth Circuit to review of an agency's decision not to prepare an environmental impact statement in the first place. *See City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975). Because the issues involved in a decision to *supplement* an EIS often markedly differ from those involved

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[3]The EIS on Elk Creek Dam was prepared in 1971, the first supplement in 1975, the second supplement in 1980. Pet. at 32a-33a.

[4]40 C.F.R. § 1502.9(c)(1) provides that agencies shall "prepare supplements to either draft or final environmental impact statements if: . . . (II) There are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts."

in a decision to prepare an EIS in the first instance, the court fashioned a definition of "reasonableness" which focuses on the nature of the new information an agency obtains. Under the test, "reasonableness" depends on:

> such factors as the environmental significance of the new information, *the probable accuracy* of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.

Warm Springs, 621 F.2d at 1024. (Emphasis added).

While never expressly saying so, the circuit court has hinted that the source of this "reasonableness" test is the APA standard of review in actions to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). According to the court, "[t]he mandatory nature of [NEPA's] directive makes the 'reasonableness' standard the more appropriate standard of review." *Foundation for North American Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1177, n.24 (9th Cir. 1982).

Three other circuits have adopted the "reasonableness standard" in reviewing agency decisions to forego preparation of an environmental impact statement in the first instance. *See Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973) ("reasonableness" should be applied to such decisions because the agency action constituted a "basic jurisdictional-type conclusion"); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269 (8th Cir. 1980), *cert.*

denied, 449 U.S. 836 (1980); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

Four circuits properly employ the "arbitrary and capricious" test under Section 706(2) of the APA. These circuits have followed the Court's decision in *Citizens to Preserve Overton Park*, 401 U.S. 402, holding that the decision of the Department of Transportation to assist construction of a highway through a federal park must be reviewed using that standard. The "arbitrary and capricious" standard is appropriate, as those courts recognize, because it offers appropriate deference to agency "expertise not possessed by the court." *Hanly v. Kleindienst*, 471 F.2d 823, 829 (2nd Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). *See also Gee v. Boyd*, 471 U.S. 1058 (1985) (White, J., dissenting from denial of cert.); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068 (1st Cir. 1980); *Nucleus of Chicago Home Owners Ass'n v. Lynn*, 524 F.2d 225 (7th Cir. 1975), *cert. denied sub nom. Nucleus of Chicago Home Owners Ass'n v. Hill*, 424 U.S. 967 (1976).

The Seventh Circuit has expressly adopted the arbitrary and capricious standard for review of decisions not to supplement an EIS. *State of Wis. v. Weinberger*, 745 F.2d 412 (7th Cir. 1984). There, the court recognized that a decision to supplement an EIS is made "in light of an already existing, in-depth review" of an action's likely environmental consequences. 745 F.2d at 418. Thus, the court held:

> an agency cannot have acted arbitrarily or capriciously in deciding not to file a SEIS unless the new information provides a *seriously* different picture of the environmental landscape such that another hard look is necessary.

745 F.2d at 419. (Emphasis in original).

This deferential standard of review, rather than the varying judicial hybrids known as "reasonableness," is particularly appropriate when a decision to supplement an EIS is reviewed. As this Court has previously recognized, consideration of the environmental consequences associated with federal actions frequently requires the application of knowledge resident in specialized agencies. *Baltimore Gas and Electric*, 462 U.S. at 104; *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976). Determining whether new information might significantly alter conclusions in an existing EIS often requires that experts critique the information and the methods by which it was obtained. "New information" usually has not undergone critical peer review by other experts. Thus, if a court disregards the judgments of agency scientists, it becomes not only the arbiter of the law but of scientific truth as well. In doing so, a court violates the central proscription of this Court against "substitut[ing] its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. at 411 n. 21 (citations omitted).

By employing a test which gives itself the absolute authority to determine the "probable accuracy" of new information in total disregard of agency and district court decisions on the topic, the circuit court has performed a function it is under express instruction not to perform. The circuit court's standard of review effectively equates the scientific judgments and analyses made by the Corps with questions of law over which the court asserts the power of *de novo* review. Pet. at 4a.

Further, in *ONRC*, the circuit court not only failed to grant any deference to the Corps' analyses, it abandoned its articulated practice of reviewing the district court's factual findings only for clear error and substituted its judgment for those findings. Pet. at 11a-17a. Thus, the circuit court exercised a standard of review far

exceeding that contemplated by the APA. The standard applied by the court in this case and *Methow Valley* goes beyond assuring "reasoned decisionmaking" by an agency, *Baltimore Gas and Electric*, 462 U.S. at 105, and improperly permits a court to "substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. at 411 n. 21.

B. <u>The Ninth Circuit Improperly Ignored the Findings of the Corps and the District Court Regarding the Significance of the Two Reports at Issue, Undertook Its Own Independent Analysis of the Reports, Misinterpreted the Reports, and Ultimately Failed to Find the Two Reports Significant Even by Its Own Improper Standard</u>.

The panel majority in *ONRC* found, with Judge Wallace dissenting, that a study by the Oregon Department of Fish and Wildlife and another study by the U.S. Soil and Conservation Service constituted "significant new information" requiring preparation of a third Supplemental EIS, and an injunction against further construction of the dam while the study was prepared.[5]

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[5]Congress authorized construction of the Elk Creek Dam in 1962. Following preparation of an EIS and two supplements between 1971 and 1980, the Corps issued its decision to proceed with the dam in 1982. The Supplemental Appropriations Act, 1985, Pub. L. 99-88, authorizing $15,000,000 for construction of the dam, was signed by the President on August 15, 1985. Pet. at 32a-33a.

Both the process followed by the panel majority in analyzing the two reports and the conclusions it reached as to the significance of the two reports were incorrect. Had the panel majority shown any deference to findings of the district court or the Corps of Engineers, the majority could not have concluded that the reports were significant or that construction should be enjoined.

The ODFW Report was hardly a surprise to the Corps of Engineers. The Corps had entered into a contract with the ODFW for the report and had paid the state agency a substantial sum of money for its efforts. The ODFW report is not in fact about the Elk Creek Dam at all. Rather, it is an analysis of the Lost Creek Dam. That dam, completed in 1977, was another of the package of three dams originally approved by Congress in 1962. The study evaluated the impact of the Lost Creek Dam on the biology of anadromous fish (salmon and steelhead) in the Rogue River.

The ODFW study primarily evaluated the impact of changes in water temperature on the survival rate of anadromous fish in the Rogue River, and the effect of epizootic diseases on the same fish. The report tangentially looked at changes in turbidity (murkiness) of the water in the Rogue River based on the operation of the Lost Creek Dam.

The Corps of Engineers by no means ignored the ODFW study when it received the final draft in August, 1985. To the contrary, the Corps immediately commissioned two independent scientists to evaluate the report, and also forwarded the report to the agency's in-house experts at the Waterways Experiment Station in Vicksburg, Mississippi, for analysis. All three evaluations expressed serious disagreement with the methods and the conclusions of the report. In addition, the Corps prepared a detailed written analysis of all the issues in the report and published it as "Supplemental Information

Report No. 2" on January 10, 1986. Administrative Record Doc. 108.

Professor S. B. Mathews of the School of Fisheries of the University of Washington, one of the independent reviewers, opened his critique of the ODFW report as follows:

> Unfortunately, this very exhaustive and painstaking study report by ODF&W contains considerable statistical inaccuracies, overextension of statistical methods and undue biological speculation . . . .

Administrative Record Doc. 112 at 1. Professor Mathews went on to identify "a statistical error," "an example of a statistical hole the authors dig for themselves," a conclusion with "no logic," another conclusion "very likely due to random error," "an example of unfounded speculation" and "a more pertinent example of undue speculation." All of these criticisms appear on the first two pages of Professor Mathews' critique.

The criticisms of the report by the second independent reviewer, Lyle Calvin, were somewhat less colorful but just as strong. Administrative Record Doc. 114. He noted that certain important data were not likely to yield conclusive results, that it was very likely that the mathematical formulas employed in the study relied on "chance relationships," that the procedure employed in the study "has low power in selecting the significant variables," and that no sensitivity analysis had been performed on the model. *Id.* at 2-5.

Finally, the Corps' Waterways Experiment Station analysis of the study also found many significant flaws in its methods and conclusions. Administrative Record Doc. 113.

It must be stressed that each of the subjects analyzed in the Lost Creek Dam Study had been evaluated by the Corps in the supplemental environmental impact statement it had prepared in 1980. The effects on anadromous fish of water temperature, turbidity and other factors were among the major concerns in the 1980 study. Thus, the ODFW report raised no issue which the Corps had not earlier considered and the sole question before the court was whether the report provided such a different picture of the project's impacts that construction should be enjoined while yet another supplemental study was completed.

Even testimony from the authors of the ODFW study showed that the report did not provide any significant new information. ODFW biologist Michael Jennings was responsible for studying the effect of the Rogue River dams on anadromous fish in the river. Jennings Deposition at 3-4. When asked if he thought the observed effects of the Lost Creek Dam would also occur after the Elk Creek Dam was built, he said: "That's difficult to tell at this point. You know it depends on the management of the reservoir." *Id.* at 12. He candidly admitted that he did not know what the effect of the Elk Creek Dam on water temperature would be. *Id.* at 15. For that matter, he testified that the reasons for the decreased survival rate of anadromous fish briefly observed after completion of the Lost Creek Dam "is speculation on our part." *Id.* at 21.

Most significantly, Mr. Jennings testified, on December 4, 1985, that his most recent information as to how the Corps planned to operate the Elk Creek Dam was that "water releases from Elk Creek could be low enough that it wouldn't impact temperatures in the Rogue." *Id.* at 52. In other words, the ODFW employee was testifying that whatever the water temperature effects of the *Lost*

Creek Dam, he did not believe there were going to be any water temperature impacts from the *Elk Creek* Dam.

ODFW employee Steven Cramer was the program leader of the Rogue Basin Evaluation and first named author of the Lost Creek Dam Report. When asked to discuss the accuracy of his computer model on which the study was based, he testified that "the model may have been inadequate." Cramer Deposition at 28. In response to the follow-up question: "The model hasn't actually been validated to the extent that you can rely on it?", he stated: "That's true." *Id.* at 28-29.

As to the concern about epizootic diseases (diseases effecting an entire population), the deposition testimony was equally persuasive that there was no legitimate issue. Mr. Cramer, the study leader, freely admitted that "we have not made a connection" between the closure of Lost Creek Dam and an epizootic disease which later occurred in the Rogue River. Cramer Deposition at 34. He also testified that the ODFW had hired a scientist to look for such a connection, and that he had been unable to find it. *Id.* at 35-37. When pressed to explain in a little more detail how epizootic diseases work, study leader Cramer conceded "I don't have much expertise on epizootics." *Id.* at 41.

Finally, on the issue of increased turbidity, the testimony was equally unimpressive. When biologist Jennings was asked about the significance of turbidity, he began to recite what the Corps' 1980 EIS had said about turbidity in Elk Creek -- hardly information that was either new or significant. Jennings Deposition at 35. Study leader Cramer freely admitted that he did not know what turbidity effect the Elk Creek Dam would have on the Rogue River. Cramer Deposition at 22. He also admitted that he had not seen any turbidity data for the Elk Creek watershed since 1980 (when the Supplemental EIS was prepared). *Id.* at 69.

On the subject of turbidity, both Jennings and Cramer testified that they believed that there had been increased logging activity in the Elk Creek watershed since 1980, and that this might cause an increase in the turbidity of the Rogue River. Jennings Deposition at 43; Cramer Deposition at 69. Neither Jennings nor Cramer had any actual information to establish that any impact on turbidity had in fact occurred. *Id.* The written report did not even mention this issue; it was raised only in deposition testimony. The Corps' Supplemental Information Report No. 2 fully addressed this issue and found it insignificant. Administrative Record Doc. 108 at 4.

The Soil Conservation Service "report" is an even more remarkable basis for an injunction than the ODFW report. In fact, the SCS report is not a report at all. It is simply a map of the Elk Creek watershed with a list of soil types which appear in different parts of the watershed. There is no discussion of the significance of the soil types. Plaintiff's Trial Exhibit 1. Not only is it not a study on turbidity, it is not a study on anything. It is simply a compilation of soil types.

The "author" of the SCS report, Roger Borine, first testified about its significance at trial on January 16, 1986. Mr. Borine admitted that he is not an engineer, he has no expertise in measuring turbidity and has never run tests on soils to see what turbidity levels they are producing. Transcript of Proceedings, January 16, 1986 at 51. Nor was he familiar with the measurement of turbidity. *Id.* at 53.

Mr. Borine was not familiar with what the Corps' 1980 Supplemental EIS had to say about soil types and turbidity; the only portions of the document he had reviewed were excerpts provided to him by the plaintiffs' attorney. *Id.* at 35, 54. He did not know that his own agency, the Soil Conservation Service, had provided a "no comment

response" to the 1980 draft Supplemental EIS. *Id.* at 55. He had no knowledge of how the Corps had analyzed the effect of soil type on turbidity. *Id.*

At trial, the district court also heard testimony from Mr. J. P. Sturgill, a registered engineering geologist and certified erosion control and sediment specialist with the Corps of Engineers. *Id.* at 69. He flatly testified that the soil mapping information provided by the SCS -- its "report" -- did not provide any new information to the Corps on levels of turbidity or turbidity production. *Id.* at 70. By the time the Corps received Mr. Borine's material, a team had already spent two weeks in the spring of 1979 investigating the erosion potentials and potential for long term turbidity production in the Elk Creek watershed. *Id.* at 72. Mr. Sturgill testified that he took a "hard look" at the turbidity issue in 1979, and that he would not have taken any different look if he had been given the material supplied by Mr. Borine in 1982. *Id.* at 73. Mr. Borine of the SCS agreed that the Corps had taken a "hard look" at the turbidity issue in its 1980 EIS. *Id.* at 64-65.

This testimony echoed the teaching of this Court in *Kleppe v. Sierra Club*, 427 U.S. 390, that the only role for a court under NEPA "is to ensure that the agency has taken a 'hard look' at environmental consequences . . . ." *Id.* at 411 n. 21, quoting *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972). Following the hearing, Judge Burns issued an opinion finding that the Corps had fully complied with NEPA and the CEQ regulations. Pet. at 46a-50a

The majority of the Ninth Circuit panel looked upon the ODFW and SCS reports in a manner that sharply contrasts with the views of Judge Burns and the Corps. Essentially, the majority simply ignored the devastating admissions by the authors of the two reports and ignored

evaluations by the Corps and Judge Burns concluding that the reports lacked significance.

As to the water temperature issue, the majority acknowledged that the ODFW staff knew that "their study was not conclusive," Pet. at 9a, but apparently concluded that the mere fact that the ODFW employees felt that further study was appropriate was itself sufficient to make the inconclusive study environmentally significant. *Id.*

The majority used essentially the same analysis in finding that the alleged impact of logging and concern over epizootic diseases was environmentally significant -- it simply presumed that the fact that a state agency asked for further study on the subject made that subject environmentally significant. Pet. at 9a-10a.

The panel majority also felt that it was the appellate court's function to determine if the information in the two reports was "probably accurate." Pet. at 11a. Yet, the best the majority could come up with was a vague statement as follows: "Based on our review of the experts' testimony and data, we believe that, at the very least, some of the proffered information is probably accurate." Pet. at 11a. The majority never disclosed what portion of the information it judged to be "probably accurate." Thus, neither the Corps nor anyone else knows what information the majority found so significant that the project must be enjoined pending further study. The majority's view of the information is even more mysterious in light of its recognition that many of the conclusions in the ODFW report had been challenged by the Corps' independent scientists. Pet. at 11a. The majority did not disclose whether it acceded to those criticisms, rejected those criticisms, or took some other view of the two reports.

The panel majority did not say that the ODFW report contained any information about epizootic diseases which

was "probably accurate." The majority merely concluded, in apparent disregard of the testimony of the ODFW staff, that "the study raised legitimate concerns" on the subject. Yet, the mere fact that someone has "legitimate concerns" on a subject which has already been fully considered and studied by an agency in an environmental impact statement does not provide a justification for enjoining an ongoing project pending completion of yet another study on the same subject.

Perhaps the majority's most remarkable statement is its contention that "[t]he Corps does not appear to have exercised the proper degree of care regarding the new information." Pet. at 12a. This conclusion is inexplicable. The Corps had the ODFW report examined by two independent scientists and its own in-house scientific staff and issued Supplemental Information Report No. 2 responding to the ODFW points. This was surely a sufficient response to the report.

Judge Wallace's dissent presents a far more proper application of the role of an appellate court in a case of this nature. Judge Wallace gave weight to the conclusions of the Corps' independent experts as well as its in-house scientific staff. Pet. at 23a. He also accorded weight to the testimony of the ODFW staff as to the weaknesses in its study. *Id.* at 23a-24a. Indeed, Judge Wallace found that the Corps "exercised a high degree of care in considering the Department study . . . ." *Id.* at 25a. Judge Wallace was plainly satisfied that the Corps had fully discharged its obligations under NEPA with regard to the ODFW report.

As to the SCS report, Judge Wallace did not feel that the report was significant irrespective of its accuracy. *Id.* He described quite accurately how the Corps' studies had already fully considered the effect of sediment on turbidity. *Id.* at 26a-27a. As to this report too, he

found that it was reasonable for the Corps to decline to prepare a Supplemental EIS on the SCS report.

Judge Wallace concluded his discussion on this issue with the following observation:

> "It is not the function of this Court to decide whether the Corps' analysis of the two studies was 'correct' scientifically. Whether or not it was, the record certainly seems to show that the Corps' decision not to issue a Supplemental EIS was reasonable . . . ."

Id. at 28a. Judge Wallace's description of the role of the court and the outcome of the *ONRC* case was correct, and should be adopted by this Court.

CONCLUSION

The orders of the Ninth Circuit in *ONRC* and in *Methow Valley* should be reversed.

Respectfully submitted,

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AMICUS CURIAE

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OCTOBER TERM, 1988

F. Dale Robertson, Chief
of the Forest Service, et al.,
Petitioners,

v.

Methow Valley Citizens Council, et al.,
Respondents.

John O. Marsh, Jr., Secretary of the Army, et al.,
Petitioners,

v.

Oregon Natural Resources Council, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

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§1508.20	15,20
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§1508.25(b)	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1703

F. DALE ROBERTSON,
Chief of the Forest Service, *et al.*,
Petitioners,

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,
Respondents.

No. 87-1704

JOHN O. MARSH, JR., Secretary of the Army,
Petitioners,

v.

OREGON NATURAL RESOUCES COUNCIL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

The International Association of Fish and Wildlife Agencies, having obtained written consent of all parties to these consolidated cases as required by Rule 36.2, submits this brief in support of respondents.

INTEREST OF AMICUS CURIAE

The International Association of Fish and Wildlife Agencies (hereinafter "the Association") is a voluntary, unincorporated association dedicated to coordinating the efforts of public administrative agencies responsible for protection and management of the fish and wildlife resources of North America. Founded at Yellowstone National Park in 1902, the Association's government members include the fish and wildlife agencies of all fifty states and the Commonwealth of Puerto Rico, and of ten Canadian provinces and territories. Government members also include federal and dominion agencies having jurisdiction and responsibility for fish and wildlife resources.

In the United States, primary authority and responsibility for protection and management of fish and resident wildlife are vested in the Association's state government members. In pursuance thereof, each state has enacted conservation legislation establishing a fish and wildlife agency or agencies charged with responsibility to protect and manage fish and resident wildlife found within the state. The policies of Oregon and Washington, whose trust resources are implicated in these proceedings, are typical. The statute establishing the Oregon Department of Fish and Wildlife declares it to be "the policy of the State of Oregon that wildlife shall be managed to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state." Oregon Rev. Stats., §496.012. The Washington legislature declares

that wildlife is the property of the state and has directed the Department of Wildlife to "preserve, protect and perpetuate wildlife." Rev. Code of Washington, Annot., §77.12.010.

Charged with such responsibility, it devolves upon the Association's state government members to participate actively in the NEPA process relating to proposals for major federal actions significantly affecting the environment when such proposals affect public trust resources for which member agencies have jurisdiction.

Congress has recognized the state interest in fish and wildlife on national forests, making explicit that federal legislative enactments are not to be construed "as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests." Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §528; §302(b), Federal Land Policy Management Act of 1976, 43 U.S.C. §1732(b). And *see Defenders of Wildlife* v. *Andrus*, 627 F.2d 1238, 1247-1250 (D.C. Cir. 1980) (despite constitutional power under the Property Clause relating to federal lands, Congress has traditionally allotted authority to manage wildlife to the states). Along with recognition of the state interest with respect to fish and wildlife on national forests, Congress has enacted legislation requiring consultation by federal development agencies with state wildlife agencies whenever the waters of any stream or other body of water are proposed to be controlled or modified for any purpose whatever, including navigation and drainage. § 2(a), Fish and Wildlife Coordination Act, 16 U.S.C. § 662(a). The purpose of such consultation is prevention of loss or damage to wildlife resources in connection with impounding, diverting or controlling of waters.

From the foregoing recital it is evident that state government members of the Association have a clear interest in representing public trust resources by virtue both of statutory responsibility and of opportunities established by

congressional enactments. Identification of measures to mitigate adverse environmental impacts of major federal actions and professional judgments as to the effectiveness of mitigation measures are central to the state role. From this perspective, the Association is of the view that acceptance of the government's position in these consolidated cases would have harmful consequences for fish and wildlife resources. Contrary to the position of the government, the Association believes that the National Environmental Policy Act does not sanction the agency failures here to provide specific mitigation plans at the EIS stage or that mitigation for fish and wildlife losses may be separated from environmental planning and considered at a subsequent time. If accepted by the Court, the government's position would effectively remove fish and wildlife resource agencies from the NEPA process until later stages of project development when engineering and fiscal constraints are greatest and when opportunities for successful implementation of a mitigation plan are diminished.

STATEMENT OF THE CASE

In both the consolidated cases, the court of appeals concluded that NEPA processes undertaken by the Corps of Engineers and the Forest Service, respectively, were legally deficient because both agencies failed to discuss adequately ways to mitigate significant adverse environmental impacts. Closely related to the legal issue of adequacy of mitigation planning are issues whether significant new information required preparation by the Corps of a supplemental EIS and whether the absence of environmental information requires preparation of a "worst-case" analysis.

The Elk Creek Case

In No. 87-1704, the Elk Creek dam contemplated by the Corps would be a 238 foot high, rock fill dam, located 1.7

miles above the confluence of Elk Creek with the Rogue River in southwestern Oregon. Elk Creek dam is one of three multiple-purpose dams which comprise the Rogue River Basin Project, designed to relieve flooding in the Rogue Basin and to accomplish additional project purposes. The Lost Creek dam and the Applegate dam are now completed. At full pool, the lake created by the Elk Creek dam would be 6.2 miles long, have 18 miles of shoreline, and would inundate 1,290 acres of land. A final EIS on the Elk Creek project was filed by the Corps in 1971, the statement acknowledging that further studies of turbidity (murkiness due to stirred-up sediment) potential was required. Turbidity studies were subsequently performed and discussed in a draft Supplemental EIS released in 1975 but controversy over impacts and benefits of the project led to a suspension of further work until effects of the Lost Creek dam on water quality in the Rogue River could be observed. The 1975 draft Supplemental EIS was not made final.

Lost Creek dam was closed in February 1977 and its reservoir was filled completely by May 1978. Based on Corps' observations of turbidity caused by Lost Creek dam during 1977 and Corps' computer simulation models, the Corps in 1980 filed a draft EIS Supplement on the Elk Creek project which included turbidity and temperature projections. The draft became a final EIS Supplement in December 1980.

Six years earlier, in 1974, the Oregon Department of Fish and Wildlife (ODFW) began extensive studies, funded by the Corps of Engineers, to determine the impacts of Lost Creek dam on chinook salmon and steelhead trout populations in the Rogue River. The goal of Phase I of the study, undertaken during the period 1974-1981, was to determine direct and immediate effects of the operation of Lost Creek dam on production and harvest of salmon and steelhead; Phase II was designed to identify long term effects of changes in the juvenile life history on the age

and abundance of returning adults. Vol. 1, Lost Creek Dam Fisheries Evaluation Report, Phase I Completion Report, ODFW 1985, 1. In order to determine operating criteria for Lost Creek dam that would optimize production and harvest of fish downstream, ODFW proposed to develop simulation models that would predict the effects of varying water temperature, flow, and hatchery supplementation on abundance of salmon and steelhead. Pursuant thereto, ODFW in August 1986 presented a report containing a simulation model of the Rogue summer steelhead population based on data gathered from 1974 through 1984. Lost Creek Dam Fisheries Evaluation, The Influence of River Temperature and Flow in the Production and Harvest of Summer Steelhead in the Rogue River, ODFW, 1986, 3. In March 1987 ODFW evaluated effect of the Lost Creek dam on spring chinook in the Rogue, its report presenting findings from twelve years of research on this species in the Rogue. Rogue Basin Fisheries Evaluation, Effects of Lost Creek Dam on Spring Chinook Salmon in the Rogue River, ODFW, 1987, 5.

In February 1987, in an internal memorandum, the author of the August 1986 ODFW report discussed new information and raised additional concerns regarding possible effects of Elk Creek dam on fish resources of the Rogue River. Drawing on the benefit of insight derived from extensive evaluations of the effects of Lost Creek dam on downstream salmonids and pointing out that spring chinook runs on the Rogue were at an all-time low, the ODFW memorandum raised concerns as to the likelihood that Elk Creek dam would increase water temperatures downstream during fall and early winter; that increase of only 1°C during January would decrease survival of spring chinook by 60-80 percent (subsequently recalculated by ODFW to 30-45 percent for a 1°C increase); that augmented flow from Elk Creek during September-October is projected and that augmented September-October flows from Lost Creek and Applegate dams have already decreased angling opportunities in the Rogue by washing out favored fishing riffles and by producing water too deep and swift for effective fly angling in most areas; that such augmented flow has caused spring chinook to spawn higher on gravel bars which increases the chances that redds (spawning areas) will be dewatered as the dams fill during February-April; and that impoundment of water behind Elk Creek dam may increase the incidence of fish diseases in the Rogue River. Appendix to Petitioners' Brief in No. 87-1704, at 3a-5a. The last stated concern was based on information derived from ODFW studies pointing to the possibility that disease in fish may have increased since closure of the Lost Creek dam. Id., 4a-5a.

Instead of undertaking analysis of the concerns raised by ODFW biologists through a supplemental EIS, the Corps addressed them in a so-called supplemental information report. The supplemental report noted that the internal ODFW memorandum did not represent an official position of the agency and then proceeded to address the concerns raised: (1) ODFW's estimate of decreased spring chinook survival, the Corps stated, does not take into account offsetting benefits from the dams and, in any event, ODFW's mathematical model is yet to be validated; (2) the fact that fall chinook mortalities occurred after Lost Creek was impounded is not firm enough evidence to implicate Elk Creek lake as a potential harbor of disease organisms; (3) flow augmentation has doubled Rogue flows in late summer and early fall and, while there have been complaints of reduced angling opportunities, studies are inconclusive and adverse effects on fishing during this period were recognized in the 1980 EIS Supplement. Appendix to Petition for Writ of Certiorari in No. 87-1704, 62a-65a.

As for wildlife, the Corps' 1986 supplemental information report also addressed concern that wildlife impacts associated with Elk Creek were not adequately addressed in the 1980 EIS Supplement because a wildlife mitigation plan had not been developed. The response of the Corps

was that the 1980 EIS Supplement recognized the need for development of a wildlife mitigation plan but because such a plan had not been developed in 1980 (and still had not been developed by 1986) the 1980 EIS Supplement assumed the maximum level of adverse effects to wildlife. According to the Corps, implementation of a mitigation plan will lessen the extent of wildlife impacts. Id., 61a.

According to the 1980 Supplemental EIS, flooding for the reservoir would adversely affect deer, elk and game bird populations. The mitigation plan for wildlife set forth in the 1980 Supplemental EIS, in its entirety, stated as follows:

> The compensation [for project-caused loss of wildlife habitat] would be accomplished by managing selected lands to increase the quality of habitat and therefore its carrying capacity for wildlife. The management would consist of a number of habitat manipulative techniques in conjunction with other land uses, landscaping at the project and development of recreation sites. Specific habitat development measures would be oriented toward development of palatable browse plants, creation of "edge," maximizing foliage height diversity in certain areas, and creation of snags in the reservoir. This compensation plan will be developed in coordination with Federal and State resource agencies.

832 F.2d at 1493.

The Early Winters Case

In No. 87-1703, a private developer filed application in 1978 to build a downhill ski area on Sandy Butte, a 3,900-acre parcel of National Forest System land overlooking the Methow Valley, an unspoiled, sparsely populated area on the eastern slope of the North Cascades in Washington. The Methow Valley provides critical winter range and migration corridors for the state's largest migratory deer herd. According to the district court, the area is "pristine."

As indicated in its environmental impact statement, the Forest Service selected alternative IV, a major development for downhill skiing having 16 lifts and capable of serving 8,200 skiers at one time (SAOT). Ski terrain would take in the north slope of Sandy Butte. Base area development would include vacation homes, permanent residences and tourist accommodations. Early Winters Alpine Winter Sports Study, 13 (hereinafter "Early Winters EIS"). Facilities to serve skiers would include restaurants, shops and other commercial uses; recreation and cultural facilities could include a golf course, horse stables, and a youth camp. Early Winters EIS at 13-14. The Early Winters project is characterized by the government as a "major destination ski resort," *i.e.*, a large, multiple-season ski area with sufficient ski runs, adequate vertical rise, and sufficiently varied activities and facilities packaged so as to entice vacationers to travel long distances and stay several days at the site. Brief for Petitioners in No. 87-1703, 4, n.3.

The Washington Department of Wildlife took the view that any level of development at Sandy Butte could result in substantial negative impacts to wildlife of the Methow Valley, impacts not limited to the immediate vicinity of the ski area. Speaking to alternative V, the preferred alternative in the draft EIS (10,500 SAOT, 16 lifts and the same base area development projections as alternative IV), the Department of Wildlife stated that the resulting loss of available winter deer range will be substantially greater than the 15 percent estimate of the draft EIS, perhaps higher than 50 percent, Early Winters EIS at 76, with the ultimate impact on the Methow deer herd a reduction in numbers in excess of fifty percent.

As in the Elk Creek case, the mitigation discussion in the Early Winters EIS is general in nature. As stated in the Early Winters EIS, "The [mitigation] measures are conceptual and will be made more specific as part of the design and implementation stages of the planning process. If later steps of the approved process identify other environmental problems associated with development on National Forest lands, additional mitigations may be required." Early Winters EIS at 14.

Separate challenges by private environmental organizations and sportsmen to the adequacy of the NEPA process engaged in by the Corps and the Forest Service were ultimately successful in the United States Court of Appeals for the Ninth Circuit. The rulings are now consolidated for review by this Court.

SUMMARY OF ARGUMENT

I. Section 2 of NEPA declares it to be a purpose of the Act "to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. §4321. That, in effect, is mitigation. Accepting that NEPA mandates no particular substantive outcome, the national policy declared in section 2 of NEPA can be achieved only if federal agencies attempt to mitigate adverse impacts of proposals. CEQ regulations are instinct with obligation on the part of federal agencies to consider mitigation measures. The position of the government that mitigation may be dealt with in generic terms, "cookbook" mitigation, in an EIS renders it impossible to comply with 40 C.F.R. §1505.2(c) which requires that the decisionmaker state whether all practicable means to avoid or minimize environmental harm have been adopted and if not, why they were not.

II. Staged project development is not exempted from NEPA. The government denounces the "rigid and unwarranted procedural regime" constructed by the court of appeals but the "procedural regime" relevant here is established by NEPA, the first aim of which is to inject environmental considerations into agency decisionmaking. *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139 (1981). Contrary to the government's assertion that mitigation planning may be set to one side and dealt with during later stages of a project, mitigation planning is an integral part of the environmental analysis process and must proceed with the NEPA process rather than be separated from it. Separating mitigation from the NEPA process for treatment in later stages means leaving such considerations to the stages of a project when engineering and fiscal constraints loom larger and when the national policy to prevent or eliminate damage to the environment is more likely to be defeated.

III. The court of appeals was correct in concluding that a mule deer study not yet in existence could not serve to satisfy NEPA requirements on a matter as critical as the potential impact of the Early Winters project. In the face of incomplete information of a matter of such significance, special NEPA treatment is required, 40 C.F.R. §1502.22, whether it be worst-case analysis or reasonably foreseeable analysis. Certainly it is profoundly inadequate to assert that no such analysis was required because, while a mitigation plan had not been developed, the concept of "mitigation" could be invoked which, by definition, could be expected to reduce any impact. Such circularity does not satisfy 40 C.F.R. §1502.22. In any event, the judgment of the Department of Wildlife was that the Early Winters EIS greatly underestimated the impact on the Methow Valley deer herd. As to uncertainty concerning potential effects of the Elk Creek dam, the court of appeals was correct in concluding that information raised in the internal ODFW memorandum was both significant and probably accurate and thus required the Corps to supplement its 1980 impact statement.

ARGUMENT

I. The Requirements of the National Environmental Policy Act Are Not Fulfilled Where the Discussion of Mitigation Measures Relating to a Significant Impact in an Environmental Impact Statement Is Generic, Providing the Decisionmaker No Basis For Concluding That All Practical Means to Avoid or Minimize Environmental Harm Have Been Adopted

Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), directs that, "to the fullest extent possible," federal agencies include in proposals for major federal actions significantly affecting the quality of the human environment a "detailed statement" on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided, and alternatives to the proposed action. As this Court has stated, NEPA has twin aims: first, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 553 (1978). Second, NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981). An agency, say the courts, must take a "hard look" at the environmental consequences before taking a major action, *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410, n.21 (1976), and it is the role of the courts to ensure that the agency "has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council*, 462 U.S. 87, 97-98 (1983). The "detailed statement" required by section 102(2)(C) of NEPA is "the outward sign that environmental values and consequences have been considered during the planning stage of agency actions." *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. at 143.

In both the consolidated cases, the court of appeals concluded that the NEPA processes undertaken were deficient because each failed to discuss adequately ways to mitigate adverse environmental impacts. In the Elk Creek case, flooding for the reservoir would adversely affect deer, elk and game bird populations yet the mitigation plan for wildlife consisted of nothing but generalities. 832 F.2d at 1493. The court of appeals found the listing of general mitigation measures inadequate to satisfy NEPA's procedural standards. According to the court below, the plan failed to specify particular techniques and failed to identify specific habitat development measures that would be utilized; more important, according to the court of appeals, the Supplemental EIS provided no analysis of the mitigation measures or any estimation of how effective the measures would be. 832 F.2d at 1493. In the Methow Valley case, the Forest Service concluded that, "with the implementation of mitigation measures," the impacts on the state's largest migratory deer herd stemming from construction of a major destination ski resort astride migration routes to critical winter range will be minor. Because the effectiveness of mitigation measures had not been assessed and the mitigation measures themselves not yet developed, the court of appeals concluded that the Forest Service lacked the critical information necessary to a reasoned decision. According to the court, the cursory discussion of impacts to the mule deer herd, based on incomplete information, is inadequate under NEPA as a matter of law. 833 F.2d at 818.

A. Both NEPA and the CEQ Regulations Require Discussion in an EIS of Specific Mitigation Measures in Connection with Significant Impacts of Major Federal Action

The government offers several arguments in an effort to overturn the holdings below that generic discussion of mitigation measures, "cookbook" mitigation, is inadequate under NEPA where significant environmental impacts are

likely. The ruling by the court of appeals that an EIS must analyze mitigation measures in detail and explain their effectiveness, 832 F.2d at 1493, is imbued, in light of the purposes of NEPA, with such common sense that it cannot be attacked directly. The government, therefore, challenges the court's requirement of a specific plan to mitigate fish and wildlife losses by characterizing it as "a significant new substantive and procedural obligation with respect to mitigation of environmental harm," Brief for Petitioner in No. 87-1703 at 22, and "the construction of a rigid and unwarranted procedural regime for developing mitigation measures." Id. at 24. But those characterizations are wide of the mark; there is no similarity between the ruling in the instant cases that an EIS requires more than a discussion of generic mitigation measures that might at some future time be adopted and a case like *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978), where the lower court overturned agency action because it disapproved the administrative procedure selected by the agency to address environmental review. NEPA may dictate no substantive outcomes but it does not follow therefrom that NEPA does not require a discussion of specific mitigation measures.

Moving beyond such characterizations, the core position presented by the government, once more an indirect challenge to the holding that NEPA requires consideration of specific plans to mitigate adverse environmental effects, is that, while NEPA requires environmental analysis and disclosure, an agency must discuss mitigation in a manner that aids reasoned decisionmaking. Brief for Petitioner in No. 87-1703, at 25. It is thus the position of the government, nineteen years after enactment of an Act to establish a national policy for the environment, that a federal agency "can and should consider mitigation opportunities when assessing the environmental consequences of a proposed action," Id., at 25, but there is no obligation to discuss specific measures or explain their effectiveness.

The government's position, in the Association's view, is contrary to the basic intent of NEPA.

The term "mitigation" is defined by CEQ to include avoiding environmental impact altogether; minimizing impact by limiting the degree or magnitude of action; rectifying impact by repairing, rehabilitating or restoring; reducing or eliminating impact over time by preservation and maintenance; and compensating for the impact by replacing or providing substitute resources. 40 C.F.R. § 1508.20. Mitigation of environmental impact is not "cookbook" as the government's position implies. Reliance in the NEPA process on generic techniques such as "managing selected lands to increase the quality of habitat," and use of "habitat manipulative techniques" such as creation of "edge" and maximization of foliage height diversity, 832 F.2d at 1493, mask the hard realities of actually achieving mitigation in cases like the ones at bar.

The reality is that mitigation planning is controversial and technical, often pressing at the edges of scientific "state of the art." The reality is that mitigation measures are often experimental and sometimes unreliable. And plainly the harshest reality of all is that when an agency invokes the concept of mitigation as a cure for impacts during the NEPA process but fails to address the specifics of mitigation in an EIS and does not commit to specific mitigation measures in its record of decision, the NEPA process will not achieve its purpose. Thus, for example, on the crucial matter of blockage of deer migration routes in the Early Winters case, the agency response in the EIS to Department of Wildlife concerns was to observe that "the opportunity exists to minimize potential problems through coordinated planning by agencies and publics involved." Early Winters EIS, at D-39. That is pure boilerplate and hardly a reassuring "outward sign" that environmental values have been injected into agency planning.

The government on brief rejects the suggestion that petitioners relied on mitigation as a cure in discussing adverse environmental effects. Instead, the government states,

> [T]he [Early Winters] Study provided a detailed discussion of the project's significant environmental effects without mitigation and then identified mitigation measures that, by definition, could be expected to reduce those impacts.

Brief for Petitioner in No. 87-1703, at 37, n.34. The government then wraps up this thought by asserting that the "qualitative" statements that implementation of mitigation measures would reduce adverse impacts are certainly reasonable. Ibid. In effect, the government says that it does not know what the measures will be but if they fall within the definition of mitigation they can be relied upon to mitigate.

Real world mitigation issues, as opposed to definitions, were the concern of the state. Commenting on the draft Early Winters EIS, the Washington Department of Wildlife recommended the no action alternative:

> Any level of development at Early Winters could result in substantial negative impacts to wildlife of the Methow Valley. However, impacts will not be limited to the immediate vicinity of the proposed ski area. Other parts of Okanogan County as well as the rest of North Central Washington could be affected. Facility development and the associated support and commercial expansion will drastically alter the ecosystem of the upper Methow Valley. Since it is our Department's responsibility to preserve, protect and perpetuate wildlife resources for the people of the State, we must recommend that the Forest Service choose the alternative which is most compatible with our goals. Clearly in the instance the only alternative we can support is Alternative I (No Action).[1]

Various concerns relating to Methow Valley wildlife were articulated by the Department of Wildlife in its comments on the draft EIS but its primary concern related to anticipated impacts at the primary ski development site and, more significantly, from residential build out in the valley on the Methow Valley mule deer herd, the state's largest migratory mule deer herd. In 1981 this portion of the herd was estimated at better than 30,000 animals, providing an estimated harvest that year of 3,247 deer. The state agency pointed out that Okanogan County residents attach great importance to the area's deer herd and, using an average of $1,980 which hunters spent in 1980 for every deer harvested in Washington, the 3,247 deer harvested in the Methow area in 1981 contributed over $6 million to the state's economy through expenditures for equipment, gas, food, lodging, and licenses. The Department of Wildlife gave as its professional judgment that impacts to mule deer will be more severe than predicted in the draft EIS. With full site development, accelerated development in the valley, increased road kills and increased human disturbance, the loss of available winter range will be substantially greater than 15 percent, according to the Department of Wildlife, and perhaps higher than 50 percent. With respect to deer numbers as contrasted to deer range, the Department pointed out that the Methow deer herd could be reduced in number by more than 50 percent.[2]

The agency disagreed with the draft EIS that sufficient summer range would be available, even at maximum development, for the existing deer herd and pointed out that access roads and on-site facilities could block migration routes to summer and winter ranges while off-site devel-

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[1] Letter dated November 18, 1982, from Washington Department of Game (now Department of Wildlife) to NEPA Coordinator.

[2] Id. at 2.

opments that block migration routes across the valley would impact the use of winter range. According to the Department, tagging studies indicate that some deer may use different migration routes to the valley in the fall than for their return trip to summer range in spring or early summer. Accordingly, the Department suggested that studies be undertaken to show which routes are used and when.[3]

Despite major concern as to impact of the Early Winters proposal on the deer herd, the Early Winters EIS contained no specific mitigation measures. Nevertheless, the record of decision concluded that alternative IV (8,200 SAOT) "provides a balance of concerns for the physical and biological components of the human environment in addition to concerns for social and economic welfare." But that assertion is without foundation. While CEQ regulations require that an agency state in the record of decision "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not," the record of decision in the Early Winters EIS commits only that the Forest Supervisor "identify opportunities to mitigate loss of key mule deer winter range on private lands through future management of the Okanogan National Forest"[4] and that the Supervisor "participate in a multiagency agreement for management of the Methow Valley mule

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[3] Id. at 3.

[4] Management of Sandy Butte is discussed in the Okanogan National Forest Plan prepared pursuant to National Forest System Land and Resource Planning Regulations. 36 C.F.R. Part 219. According to the proposed forest plan, land use of Sandy Butte is fixed for operation of a major downhill ski resort but the plan does not fix the area for mule deer mitigation. The proposed plan states that if the decision of the Regional Forester is upheld by the courts implementation will be guided by the Record of Decision for Early Winters. Draft Environmental Impact Statement, Proposed Land and Resource Management Plan, Okanogan Natural Forest, 1986, II-11.

deer population." Record of Decision, pars. 3, 5(B). Subsequent to issuance of the EIS, however, the Forest Service has declined to identify funding sources to assure that mitigation opportunities will be met. Due to the conceptual nature of the Early Winters EIS and the vagueness of commitment in the record of decision, avenues for insuring that mitigation is suitably developed are extremely limited.

B. Discussion of Mitigation Measures in Generic Form Does Not Enable the Decisionmaker To Declare That All Practicable Means To Avoid Or Minimize Environmental Harm From The Alternative Selected Have Been Adopted, And If Not Adopted, Why They Were Not

The government argues that NEPA imposes no substantive obligation on the decisionmaker to mitigate adverse environmental effects of a proposal, and thus there is no procedural requirement either to analyze mitigation measures in detail or to explain the effectiveness of such measures. Brief for Petitioners in No. 87-1703, at 24. Instead, the government asserts a fundamentally different proposition, viz., that a federal agency "must discuss mitigation in a manner that aids reasoned decisionmaking." Id., at 25. In light of the facts in the consolidated cases, the government's fundamental proposition is that "reasoned decisionmaking" under NEPA does not require disclosure and discussion in an EIS of appropriate mitigation measures, and that a listing of conceptual measures to be made more specific at a later stage is adequate.

Amicus Association believes the government's proposition is contrary to the fundamental congressional purpose of ensuring that environmental factors are integrated into agency decisionmaking. Section 2 of NEPA, the purposes section, declares it to be a purpose of the Act "to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. §4321. That, in effect, is mitigation. Indeed, accepting the constraint that NEPA mandates no substantive outcomes, the national policy declared in sec-

tion 2 to encourage productive and enjoyable harmony between man and his environment can only be achieved if federal agencies, through application of the NEPA process, consider ways to mitigate adverse impacts of projects carried out under their authority. In addition, section 102(2)(C), 42 U.S.C. §4332(2)(C), requires that the responsible official include a "detailed statement" on alternatives to the proposed action. Mitigation measures, of course, are a type of alternative to a proposed action. 40 C.F.R. §1508.25(b). Given the critical role of mitigation in the fulfillment of national policy enunciated in NEPA, the mitigation plan is one of the most important elements, if not the most important element, in the NEPA process. It is therefore difficult to accommodate the government's "fundamentally different" proposition with the purposes of NEPA.

It is equally difficult to harmonize the government's proposition with the CEQ regulations.[5] The government lists CEQ regulations relating to mitigation measures, Brief for Petitioners in No. 87-1703, at 28-31; Brief for Petitioners in No. 87-1704, at 21-22, but fails to credit the natural signification of the words chosen by CEQ. In fact, the CEQ regulations devote considerable attention to mitigation, defining the term at section 1508.20; calling on agencies at section 1508.25(b) to consider mitigation measures as an alternative to the proposed action in conducting the scoping procedure; calling on agencies at section 1502.14(f) to include appropriate mitigation measures in the "alternatives" section which CEQ describes as "the

[5] The CEQ regulations establish uniform procedures for implementing the provisions of NEPA. Executive Order 11991 of May 24, 1977 directed the Council on Environmental Quality to issue the regulations and, in accordance with the Executive Order, the CEQ regulations are binding on all federal agencies. 43 Fed. Reg. 55978 (November 29, 1978). While not legislative rules, the CEQ regulations are entitled to substantial deference by courts. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

heart of the environmental impact statement"; calling on agencies at section 1502.16(h) to include in the "environmental consequences" section means to mitigate adverse environmental (if not "fully covered" under § 1502.14(f)); and calling on cooperating agencies having jurisdiction by law, at section 1503.3(d), to specify the mitigation measures considered necessary when such cooperating agency objects to a proposal.

The CEQ regulation most repugnant to the government's fundamental position on mitigation is section 1505.2(c) which requires that a concise, public record of decision be prepared in cases requiring environmental impact statements which shall:

> (c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. §1505.2(c). The record of decision was viewed by CEQ as a practical mechanism for overcoming a serious problem in the administration of NEPA prior to 1978, viz., "the separation between an agency's NEPA process and its decisionmaking process." 48 Fed. Reg. 55978, 55985 (November 29, 1978). According to CEQ,

> In too many cases bulky EISs have been prepared and transmitted but not used by the decisionmaker. The primary purpose of requiring that a decisionmaker concisely record his or her decision in those cases where an EIS has been prepared is to tie means to ends, to see that the decisionmaker considers and pays attention to what the NEPA process has shown to be an environmentally sensitive way of doing things. Other factors may, on balance, lead the decisionmaker to decide that other policies outweigh the

> environmental ones, but at least the record of decision will have achieved the original Congressional purpose of ensuring that environmental factors are integrated with the agency's decisionmaking.

43 Fed. Reg. at 55985-986. The cases under review demonstrate that a new problem has been substituted for the problem identified by CEQ in 1978. The problem then was that decisionmakers often ignored "the environmentally sensitive path" laid out in an EIS. Now with the path laid out in conceptual terms the decisionmaker need commit to nothing more than concepts as in the cases at bar. A device of that sort simply does not comport with the language of the statute, the intent of Congress, or the CEQ regulations. Certainly it is contrary to the requirements of 40 C.F.R. §1505.2(c) which direct the decisionmaker to state whether "all practicable means to avoid or minimize environmental harm" from the selected alternative have been adopted and if not, why not. By failing to pursue mitigation planning at an early stage, neither the Corps of Engineers nor the Forest Service was in a position to comply with that obligation.

II. Proposals For Major Federal Action Which Involve Staged Decisionmaking Are Not Exempted By NEPA. The Deferral of Essential Elements Of Mitigation Planning To Later Stages Following Completion Of The NEPA Process And Decision To Authorize Development Is Contrary To The Statute

The court of appeals held that NEPA compliance requires that an agency analyze mitigation measures in detail and explain the effectiveness of the measures. 832 F.2d at 1493; 833 F.2d at 817. These holdings are in perfect harmony with the language of the statute and the CEQ regulations. Indeed, it seems to us that NEPA and the CEQ regulations are instinct with obligation on the part

of the federal agency to deal with mitigation measures in precisely the manner described by the court of appeals.

The government adopts an apocalyptic view of these proceedings. It characterizes the court's requirement that an agency "explain the effectiveness of the measures" as requiring a "demonstrably effective" mitigation plan, and elsewhere accuses the court of appeals of "the construction of a rigid and unwarranted procedural regime for developing mitigation measures." Brief for Petitioner in No. 87-1704, at 14. According to the government, the ruling below would actually impede informed agency decisionmaking by preventing federal agencies from carrying out their resource management responsibilities through systematic project development. Brief for Petitioners in No. 87-1704, at 15.

The principal vice of the rulings below, as identified by the government, is the loss of flexibility by agencies which choose to implement their activities through staged project development. According to this argument, an agency cannot develop a "complete mitigation plan" at the preliminary stages of the decisionmaking process and therefore a requirement to do so would have the perverse effect of (1) encouraging agencies either to invest large sums of money and time before making even preliminary decisions or to defer environmental analysis until far along in the planning process; and (2) discouraging agencies from identifying mitigation measures that may be possible but cannot be guaranteed. Brief for Petitioners in No. 87-1703, at 38. The government's position is at odds with the national policy declared in NEPA.

The overarching principle animating the CEQ regulations is not administrative flexibility but the establishment of uniform procedures to achieve more effectively the congressional purpose of ensuring that environmental factors are integrated into the agency's decisionmaking. 43 Fed. Reg. 55978, 55985-986 (November 29, 1978). Indeed,

the primary CEQ directive with respect to planning is that agencies shall integrate the NEPA process with other planning at the earliest possible time to ensure that planning and decisions reflect environmental values. 40 C.F.R. § 1501.2. There exists a "procedural regime" for developing mitigation measures but it is to be found in section 1501.2, not in the rulings below. That this was the principal aim of Congress has been confirmed by the Court. As stated in *Weinberger* v. *Catholic Action of Hawaii*, the first aim of NEPA is "to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS." 454 U.S. at 143.

The government's implicit position in these consolidated cases is that while the NEPA process should be integrated into agency planning at the earliest possible time, mitigation planning can be set aside and dealt with during later stages. In both environmental statements under review, mitigation measures were given "a lick and a promise." Both the Corps and the Forest Service adopted the device of inserting mitigation discussion of a general nature in the EIS while the record of decision contained statements of hope and aspiration but little by way of specific commitment. Thus the 1980 Elk Creek SEIS listed general measures to mitigate impact of the project on wildlife and explained that specific mitigation measures would be developed based upon results of a wildlife compensation plan underway at Applegate Dam, one of the two dams already constructed as part of the Rogue River Basin Project. According to the government, such a discussion of wildlife mitigation "was sufficiently thorough for the decision at hand, whether to proceed with the Elk Creek Dam. The *Statement* identified mitigation measures but left the details to future development." Brief for Petitioners in No. 87-1704, at 12. In like manner, the Forest Service separated mitigation planning from the NEPA process. The Early Winters EIS declared that its treatment of mitigation was conceptual. "The measures

are conceptual and will be made more specific as part of the design and implementation stages of the planning process." Early Winters EIS, at 14.

Mitigation planning is an integral part of the environmental analysis process and, as such, should proceed as a part of that process, not separate from it. CEQ defines the "NEPA process" as all measures necessary for compliance with the requirements of section 2 and Title I of NEPA." 40 C.F.R. §1508.21. Indeed, an explicit purpose of NEPA is the promotion of "efforts which will prevent or eliminate damage to the environment," in effect, mitigation. 42 U.S.C. §4321.

Separating mitigation from the NEPA process for treatment in later stages has generally meant leaving such considerations to the stages of a project when engineering and fiscal constraints are greatest. Congress in 1986 recognized this problem in connection with water resource development, enacting legislation requiring that the Corps of Engineers submit no proposal for authorization of such projects unless accompanied by a specific plan to mitigate fish and wildlife losses. Section 906(d) of the Water Resources Development Act of 1986 provides:

> After the date of enactment of this Act, the Secretary shall not submit any proposal for the authorization of any water resources project to the Congress unless such report contains (1) a recommendation with a specific plan to mitigate fish and wildlife losses created by such project, or (2) a determination by the Secretary that such project will have a negligible adverse impact on fish and wildlife. Specific mitigation plans shall ensure that impacts to bottomland hardwood forests are mitigated in-kind, to the extent possible.

§906(d), 33 U.S.C. §2283(d). We refer to section 906(d) not because the Water Resources Development Act of 1986 controls the consolidated cases but rather because it re-

flects directly on the government's principal argument that the requirement for a specific plan to mitigate wildlife losses will prevent federal agencies from carrying out their resource management responsibilities through systematic project development. Brief for Petitioners in No. 87-1703, at 20. Congress obviously does not subscribe to that view.

Finally, the government argues that CEQ encourages agencies to utilize the practice of tiering environmental impact statements, and asserts further that the Forest Service reasonably concluded, in the Early Winters case, "in accordance with the concept of tiered decisionmaking, that the detailed mitigation measures were not yet ripe for specification, and a general discussion of possible mitigation measures would sufficiently inform its inquiry whether to go forward with the project." Brief for Petitioners in No. 87-1703, at 26, n.25, 31. But this is not a tiering situation.

Tiering of environmental analysis is appropriate at the broad program level, such as regional or areawide plans, where specific environmental impact analysis will be prepared for specific projects when and if subsequently proposed. A programmatic EIS is prepared for the broad program and a site-specific EIS for particular projects. When the tiering concept is applied to a single project such as the Elk Creek dam or the Early Winters ski development, it is apparent that project evaluation will be subject to "piecemealing," the very opposite of comprehensive project evaluation contemplated by NEPA. The longer that mitigation measures remain uncertain, the greater the likelihood that significant irretrievable commitments of time and money will occur, thereby reducing or eliminating the possibility that the project can be modified if mitigation measures have become too costly or technically unfeasible. It is for this reason that CEQ directs agencies to prepare environmental impact statements so as not to commit resources prejudicing selection of alternatives before making a final decision. 40 C.F.R. §1502.2(f).

So far as mitigation measures were concerned, therefore, the agencies in the consolidated cases may have imported the concept of tiering into their decisionmaking but did not agree to prepare a separate EIS for the environmental mitigation measures deemed not yet ripe for review. There may well be single project situations where an EIS can provide direction for mitigation planning, the results of which can then be reviewed in a subsequent environmental impact statement at a later stage. But, so far as amicus can determine, that is not contemplated here. Here the Forest Service adopted only "the concept of tiering" but apparently does not intend to tier from the Early Winters EIS to an EIS relating to mitigation measures. See 40 C.F.R. § 1500.4(i).

III. Whether Worst Case Analysis or Reasonably Foreseeable Impacts Analysis Is Employed, the Rulings Below Correctly Determined That Information Essential to a Reasoned Choice Among Alternatives Was Incomplete and That Uncertainty Existed

Significant environmental impacts which are reasonably foreseeable are the type of impacts an agency is obligated to analyze in an EIS. In the context of CEQ's regulation dealing with incomplete or unavailable information, 40 C.F.R. § 1502.22, the term "reasonably foreseeable" impacts includes low probability/severe consequence impacts. 51 Fed. Reg. 15618, 15622 (April 25, 1986). CEQ regulations instruct that the absence of complete information concerning reasonably foreseeable significant impacts calls for special treatment in an EIS. Whether that treatment be "worst case" analysis, as indicated by the court of appeals, or reasonably foreseeable impacts evaluation based on theoretical approaches or research methods generally accepted in the scientific community, as urged by the government, we think the courts below were correct in de-

termining that incomplete information and uncertainty triggered special treatment in the EIS.

In No. 87-1703, the Methow Valley mule deer herd now constitutes the largest migratory herd in the state. It provides recreational, aesthetic, and economic values to Washington residents, and significant concern exists that any level of development at Early Winters could drastically alter the ecosystem of the upper Methow Valley. As stated in Department of Wildlife comments on the draft EIS, loss of summer and winter range and blocked migration routes to available ranges will substantially reduce deer numbers. At full site development, the Washington Department of Wildlife anticipated a loss of winter range in excess of fifty percent, far more than the 15 percent loss predicted by the Forest Service. As we noted at the outset, Congress has explicitly recognized the primary authority and responsibility of the state for the management of fish and wildlife on National Forest lands. Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 528; § 302(b), Federal Land Policy Management Act of 1976, 43 U.S.C. § 1732(b). In the circumstances, others are entitled to hold views on the efficacy of measures to manage and protect the Methow Valley deer herd but the Department of Wildlife is required by law to make judgments. In its judgment, ultimate impact on the Methow deer herd could exceed a fifty percent reduction in numbers.

Because the Forest Service had in preparation but had not completed a comprehensive mule deer study when the Early Winters EIS was issued, the court of appeals concluded that the cursory discussion of impacts to the mule deer was based on incomplete information. Sending the matter back to the agency, the court of appeals stated that if the comprehensive study still provides incomplete information, a worst case analysis would be required for areas in which information is lacking. 833 F.2d at 818.

In No. 87-1704, the Oregon Fish and Wildlife Department formally criticized the Corps' conclusion that Elk Creek dam would have little effect on temperature and turbidity downstream in the Rogue River. The agency which has responsibility by law to protect and manage the fishery resources of the state specifically disagreed with the Corps' finding that Elk Creek would make only a small contribution to total flow in the Rogue. Because the Corps subsequently acknowledged that Elk Creek could contribute up to twenty-five percent of flow in the Rogue River during periods of high flow, 832 F.2d at 1497, the court of appeals determined that the Corps' assessment of turbidity, a highly significant potential impact with effects on downstream recreational activities, was subject to uncertainty and that the Corps should have included a worst case analysis. 832 F.2d at 1497.

The Supremacy Clause does not admit and we do not suggest that state agencies, regardless of their responsibilities, hold any veto over the federal actions in these cases. Instead, it is the NEPA process that forces action in both cases. Important fish and wildlife resources may be adversely affected and the state agency responsible for the affected resources has raised specific concerns, exposing incomplete information in the Early Winters case and uncertainty in the Elk Creek case with respect to the extent of project impacts. In the circumstances, we think the courts below were correct in determining in the Early Winters case that incomplete information relating to the impacts on the state's largest migratory deer herd would require the Forest Service to deal with the lack of information, not merely deny the existence of impacts. In the Elk Creek case, the information in the internal ODFW memorandum was significant new information and, in light of the intensive study by ODFW of salmon and steelhead in the Rogue River since 1974, the court of appeals was on firm ground in concluding that it was probably accurate and required the Corps to supplement the 1980 statement.

CONCLUSION

For the reasons set forth above, Amicus Association believes the decisions of the court of appeals in these consolidated cases should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

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OCTOBER TERM, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, *et al.*,
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Respondents

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, *et al.*,
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Respondents

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF CENTER FOR ENVIRONMENTAL EDUCATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF CENTER FOR ENVIRONMENTAL EDUCATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

ISSUES PRESENTED

1. Was the Court of Appeals' application of the pre-amendment or original version of the Council of Environmental Quality Regulation on incomplete information, 40 C.F.R. § 1502.22 (1979), proper under the grandfather clause of the amended regulation, 40 C.F.R. § 1502.22(c) (1986), when the Notices of Intent to prepare the Environmental Impact Statements were published prior to May 27, 1986?

2. Whether NEPA and its implementing regulations require agency evaluation of mitigation measures in appropriate cases under applicable standards of judicial review?

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Center for Environmental Education is a national conservation organization whose purposes include monitoring environmental issues of concern to the general public with special reference to those pertaining to the coastal and marine environment. The Center is supported by approximately 100,000 members nationwide. The Center seeks to educate the public concerning those issues. The Center regularly participates in agency processes under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1982) (hereinafter "NEPA"), both to inform itself and its supporters about significant environmental issues and to contribute to those processes through the commenting mechanism.

---

[1] All parties have consented in writing to the participation of the Center as an amicus pursuant to Rule 36, Revised Rules of the Supreme Court.

Lead counsel for the Center is the former General Counsel of the Council on Environmental Quality responsible for drafting the CEQ NEPA Regulations, 40 C.F.R. Parts 1500-1508 (1979).

SUMMARY OF ARGUMENT

This brief is confined to two issues, that concerning the appropriate application in these cases of the Council on Environmental Quality's (hereinafter "CEQ") regulation concerning incomplete information and that concerning the role of mitigation under NEPA and its implementing regulations.

With respect to the former issue, under the grandfather clause of the amended Council on Environmental Quality regulation governing incomplete information, 40 C.F.R. § 1502.22(c) (1986), the original or preamendment version of the regulation is to be applied when the Notice of Intent (to prepare an environmental impact statement) was published in the Federal Register prior to May 27, 1986. The Notices of Intent in both the present cases were published prior to that date. That being the case, under the terms of the present, amended regulation, the original regulation governed the environmental documentation in this case. It is that original regulation which the Ninth Circuit applied (albeit without the analysis summarized above), so the decision below should not be overturned.

With respect to the second issue, that of mitigation, both the Ninth Circuit and the Government use language that departs in the first instance from the law and the regulations and the second from the reality of NEPA's implementation. Mitigation is, however, central to implementation of NEPA and the CEQ NEPA Regulations. While the Ninth Circuit's language about the need for a "mitigation plan" is inaccurate as a universal generalization, that court's emphasis on the importance of mitigation and its scrutiny of it are appropriate and necessary to the implementation of the Act.

ARGUMENT

Introduction

As outlined in the summary above, this amicus brief is confined to two issues: whether application of the grandfather clause of the CEQ regulation on incomplete information means that the Ninth Circuit applied the proper original regulation and whether, despite excessive language, the Ninth Circuit properly implemented the requirements with respect to mitigation pursuant to NEPA and the CEQ regulations.

I. The "Worst Case" analysis issue is inappropriately before the court because under the grandfather clause of the "amended regulation", 40 C.F.R. § 1502.22(c), the issue was properly handled in both cases under the earlier, "original" worst case regulation.

The "worst case" issue that was presented as the lead question for review does not belong before this Court. In both the cases which are the subject of the proceeding, under the terms of the "amended" regulation, 40 C.F.R. § 1502.22 (1986), the preamendment or "original" regulation, 40 C.F.R. § 1502.22 (1979), was applicable.[2] Since the Ninth Circuit on both cases proceeded under that origial regulation, according to the grandfather clause of the amended regulation, § 1502.22(c), that court acted in accordance with the requirements of both the original and the amended regulations. There was no error by the Ninth Circuit occasioning review. This issue does not belong before this Court in the present cases.

The pertinent grandfather clause of the amended regulation, § 1502.22(c), states:

[2] In distinguishing between the 1979 regulation and the 1986 regulation, we employ the terms used by the CEQ, terming the former the "original" regulation and the latter the "amended" regulation. 40 C.F.R. 1502.22(c) (1986) (as amended). This amendment to the 1979 CEQ regulations is the only amendment the agency has adopted.

> (c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR § 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

40 C.F.R. § 1502.22(c).[3]

The newly added 40 C.F.R. § 1502.22(c) thus makes the "amended" regulation (as distinguished from the "original" regulation) "applicable to all environmental

[3] The government in its Petitions for Writs of Certiorari in both Nos. 87-1703 and 87-1704 (hereinafter "Petition" or "Petitions") stated as a Question Presented, "Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement . . . a 'worst case analysis' of potential environmental harm if relevant information [concerning significant environmental effects] is unavailable or too costly to obtain." Petitions at I (bracketed portion appears only in 87-1703).

The grandfather clause of the amended regulation, 40 C.F.R. § 1502.22(c), is mentioned in neither petition. Indeed, the amended regulation, which is reprinted "in pertinent part" as an appendix to each petition, sets out 1502.22(a) and (b) but omits (c). Petition in No. 87-1703 at 73a-74a; Petition in No. 87-1704 at 70a-71a.

The government also does not discuss the governing grandfather clause in its briefs on the merits, although it does accurately quote the whole of the section in the appendices. Briefs for the Petitioner in No. 87-1703 at 1a-2a and in No. 87-1704 at 1a-2a.

The Brief of Methow Recreation, Inc. asserts that "[i]t is of no consequence that the original version of the 'worst case analysis' requirement was in effect at the time the *Early Winters Study* was prepared," since the Court of Appeals' requirement applied prospectively to a deer herd study initiated in response to the Record of Decision rather than to an earlier document prepared under the original regulation. Brief for Methow Recreation, Inc., at 25 n.23. That assertion represents a misreading of § 1502.22(c) in that that section makes the date of filing of the Notice of Intent determinative rather than the date of preparation of a follow-up document. The Ninth Circuit appropriately followed the original regulation.

impact statements for which a Notice of Intent (40 C.F.R. § 1508.22) is published in the Federal Register on or after May 27, 1986." Such a "NOI" is published as soon as possible after the agency's decision to prepare an EIS and before the "scoping" process. 40 C.F.R. § 1501.7 (1979). This document alerts the public that the EIS is to be prepared and to the "scoping" process, which is the first opportunity for the public to participate in identifying or "scoping" the significant issues that should be studied in the EIS. *See* 40 C.F.R. §§ 1501.7, 1508.22, 1508.25 (1979).

Since the EISs in both cases were prepared well prior to the May 27, 1986, date, the NOIs—which necessarily precede the EISs—were prepared even earlier. The draft environmental impact statement in the *Methow Valley* case was prepared in 1982, and the final environmental impact statement was issued in 1984.[4] *Methow Valley*, 833 F.2d at 812. At the time of the Ninth Circuit's consideration of the *Methow Valley* case, the Forest Service was in the process of preparing a detailed and comprehensive study of the mule deer. *Id.* at 817. The Forest Service was to evaluate the results of that study when complete. If the study still provided incomplete information on the mule deer, the Court said a worst case analysis would be necessary. *Id.* at 818. Presumably if the information were complete, no such analysis would be required, and the Forest Service could proceed to make a fully informed decision. There is nothing in the chronology or analysis which results in the NOI in the *Methow Valley* case occurring after the 1986 cut-off date. *See* § 1502.22(c) (1986) (as amended). The amended regulation allows agencies to "choose to comply with the requirements of either the original or amended regulations" for "environmental impact statements in progress." *Id.*

[4] A "Record of Decision" adopting a "future management plan" was also adopted in 1984. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 812 (9th Cir. 1987).

Here, no environmental impact statement was in progress. It had been completed. What was in progress was a non-NEPA mule deer study the results of which might or might not have resulted in a need for further analysis.[5] Under the terms of the amended regulation, the amended regulation does not apply to the *Methow Valley* case. The Court of Appeals properly proceeded under the original regulation.

In *Oregon Natural Resources Council* v. *Marsh*, 832 F.2d 1489, 1492 (9th Cir. 1987), the final EIS was filed in 1971. A draft supplemental EIS[6] was filed in 1975, and a revised draft supplemental in 1980. *Id.*[7] Thereafter, the comments on this document and responses to them were placed in a separate section and the aggregate released as the final supplemental EIS. *Id.* The Record of Decision was signed in 1984, and the litigation commenced in 1985. Opinion and Order of the Magistrate, appearing as Appendix B to Petition in No. 87-1703 at 20a-21a.

[5] While the body of the Ninth Circuit's discussion covers the mule deer study which, depending on the results, might lead in turn to a worst case analysis being required, there was no requirement for a new EIS. *Methow Valley*, 833 F.2d at 816-818. The portion of the opinion dealing with mitigation requires a fuller discussion of mitigation, which in effect requires an addition to the existing EIS. The district court is then directed to enter "appropriate relief in accordance with this opinion." *Id.* at 820. A footnote in the mitigation discussion refers to a new EIS having to be prepared, *id.* at 819 n.13, but that form of relief does not follow from the substantive discussion.

However, whatever is ordered by the Court with respect to future studies, it must not be forgotten that what is under review in this case is the past EIS that is in the administrative record. That EIS is, according to the amended regulation, to be reviewed under the original regulation. § 1502.22(c) (as amended).

[6] The requirements with respect to supplemental EISs are set out in 40 C.F.R. § 1502.9(c) (1979).

[7] The CEQ NEPA Regulations, including the original § 1502.22, were effective July 30, 1979. 40 C.F.R. § 1506.12 (1979).

Here again, as in *Methow Valley*, the Ninth Circuit panel did not directly require a worst case analysis, but rather instructed the agency to consider two new studies and to take the information in them "into account in its decision concerning a worst case analysis." *Oregon Natural Resources*, 832 F.2d at 1497. If uncertainty then remained, either further research or a worst case analysis would be warranted. *Id.*

Again—as in *Methow Valley*—the document under review, the EIS, was prepared well in advance of the effective date of the amended § 1502.22. By the terms of the amended regulation the original regulation applies. § 1502.22(c) (as amended).

The government is right in saying that deference is due CEQ and that the CEQ NEPA Regulations govern. Briefs for the Petitioner in No. 87-1703 at 21-22 and in No. 87-1704 at 16. Those regulations require application of the original § 1502.22, which is what the Ninth Circuit applied. There is no issue appropriately before this Court concerning worst case analysis. Amicus respectfully suggests that, as to the worst case issue, this Court either decide that *certiorari* was improvidently granted or that it summarily dispose of the issue without extended discussion of the merits of a regulation repealed two years ago and of ever-diminishing applicability.

II. Both the Government and the Ninth Circuit err in the breadth of their assertions respecting the role of mitigation under NEPA. The role is, nevertheless, central to implementation of the Act and the CEQ Regulations.

In both cases under review, Judge Ferguson spoke of a "complete mitigation plan." *Methow Valley*, 833 F.2d at 820; *Oregon Natural Resources Council*, 832 F.2d at 1493. While the context of each case supports an appropriate emphasis on the importance of mitigation, the wording quoted above exceeds what NEPA and its implementing regulations actually specify. The Government posed as a question presented in both cases whether NEPA "requires federal agencies to include in each environmental impact statement . . . a fully developed plan to mitigate environmental harm . . . ." Briefs for the Petitioners in No. 87-1703 at I and No. 87-1704 at I. The Government then went on to characterize the Court of Appeals' somewhat excessive language as a "novel interpretation" that would "profoundly alter the federal agencies' [compliance] obligations." Briefs in No. 87-1703 at 19 and No. 87-1704 at 14 (bracketed portion appears only in No. 87-1703). The Government bewailed "inflexible new procedural requirements" which are "foreign to NEPA . . . ." Briefs in No. 87-1703 at 25 and in No. 87-1704 at 18.

Nonsense. Mitigation is, as a matter of routine, discussed—as it should be—in the vast preponderance of federal agency NEPA statements and processes. Use of the "profound alteration" language suggests the hand of one more familiar with the hyperbole of brief writing than with the actual implementation of the Act. Mitigation is essential to NEPA's operation; in fact, the agencies appropriately employ mitigation in most cases.

A. *Mitigation is an essential element of the statute.*

NEPA's own terms—without using the word "mitigation"—require the identification and explication of it. Subsection 102(2)(C)(i) requires analysis in environmental impact statements[8] of the "environmental impact of the proposed action" while the immediately following subsection, § 102(2)(C)(ii), requires discussion of "any adverse environmental effects which cannot

[8] The environmental impact statement required by § 102(2)(C) of NEPA is one of the "action-forcing" procedures devised by Congress to insure that the policies of its enactment are implemented. *See Andrus* v. *Sierra Club*, 442 U.S. 347, 350 (1979); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 409 (1976); 40 C.F.R. § 1500.1(a) (1979).

be avoided should the proposed be implemented . . . ."[9] Since environmental "impact" and environmental "effect" are synonymous,[10] it is the difference between the two sections—the impacts which can be avoided—that is the required discussion of mitigation. In effect, (C)(i) minus (C)(ii) equals mitigation—what is done to avoid environmental impacts.[11] This concept—mitigation—is defined for purposes of NEPA as follows:

> § 1508.20 Mitigation.
>
> "Mitigation" includes:
>
> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
>
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

[9] In the words of a leading text-writer, "NEPA implicitly requires the discussion of mitigating measures in impact statements by requiring the discussion of 'any adverse environmental effects which cannot be avoided.'" D. Mandelker, *NEPA Law and Litigation*, § 10:30 (1984) (quoting NEPA § 102(2)(C)); *see Prince George's County* v. *Holloway*, 404 F.Supp. 1181, 1187 (D.D.C. 1975).

[10] The terms "environmental impact" and "environmental effect" are used synonymously in implementing NEPA. 40 C.F.R. § 1508.8.

[11] NEPA includes among its purposes the encouragement of "productive and enjoyable harmony between man and his environment . . ." as well as the promotion of efforts to "prevent or eliminate damage to the environment . . . ." NEPA, § 2. The Congressional declaration of the National Environmental Policy includes the creation and maintenance of conditions "under which man and nature can exist in productive harmony . . . ." § 101(a). It is this duality, this recognition of the balancing of multiple interests, that permeates NEPA. The next following section, 101(b), requires the government to "use all practicable means consistent with other considerations of national policy" to ensure Americans an environment that is at once "safe" and "productive," § 101(b)(2); that promotes the "widest range of beneficial uses of the environment without degradation . . ." § 101(b)(3); and that will "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities . . . ." § 101(b)(5).

> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
>
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
>
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508.20.

In the real world of NEPA implementation mitigation is essential to the operation of the statute. While a great hue and cry is apt to attend a decision to approve or to block some massive and controversial proposal, for the vast preponderance of projects such all-or-nothing decisions are not what occurs. Projects are neither approved with what are often their initial environmentally oblivious impacts nor are they scuttled because they cause some environmental harm. Rather, the concept of mitigation permits the accommodation of multiple and even conflicting values. Projects are approved, but as part of the approval processes their environmental harms are lessened or removed. The impacts are, in short, mitigated. Both environmental betterment and other legitimate objects of human pursuit and public concern are through mitigation accommodated and given their due weight by agencies exercising the discretion entrusted to them. Mitigation thus benefits both environmental values —in that those values are furthered by the measures that are adopted—and developmental values—in that projects are enabled to proceed once their environmental impacts have been mitigated.

B. *Mitigation is an essential element of the CEQ NEPA Regulations.*

The CEQ's NEPA Regulations, 40 C.F.R. Parts 1500-1508,[12] reflect the importance of mitigation. After de-

[12] This Court has characterized the CEQ NEPA Regulations as a "single set of uniform, mandatory regulations . . . ." *Andrus* v.

termining the scope of a study and resulting document, 40 C.F.R. §§ 1508.25(b), 1501.7, mitigation must be discussed in at least one of two places in the environmental impact statement.[13] § 1502.14(f) (dealing with alternatives) requires agencies to "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives."[14] Sec. 1502.16(h) (dealing with

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Sierra Club, 442 U.S. 347, 357 (1979). The Court described their adoption through a "detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all Federal agencies." *Id.*, at 358. "CEQ's interpretation of NEPA," said this Court, "is entitled to substantial deference." *Id.*

[13] Chronologically the NEPA process, *see* 40 C.F.R. § 1508.21, as applied to a specific "major Federal action[] significantly affecting the quality of the human environment," 40 C.F.R. § 1502.3, begins with early planning, 40 C.F.R. § 1501.2, and includes: a decision as to what agency or agencies will prepare what sort of environmental document, 40 C.F.R. §§ 1501.3-1501.6, 1508.10; a "scoping" process designed to determine the scope of an environmental impact statement if one is to be prepared, 40 C.F.R. § 1501.7; preparation of a draft statement, 40 C.F.R. § 1502.9(a); receipt of comments on the draft, 40 C.F.R. Part 1503; preparation of final statement, 40 C.F.R. § 1502.9(b); possible referral to CEQ, 40 C.F.R. Part 1504; followed by the agency's review process, 40 C.F.R. § 1505.1 (1979). The agency prepares a concise record of decision, 40 C.F.R. § 1505.2, and in appropriate cases insures that its decision is implemented. 40 C.F.R. § 1505.3.

The Government's outline of the role of mitigation under the CEQ NEPA Regulations is a complete one. Briefs in No. 87-1703 at 28-30 and in No. 87-1704 at 20-23.

[14] The precise language in the Regulation is conscious, acknowledging that mitigation may be already included in a proposal. 40 C.F.R. § 1502.14(f); *see also* 40 C.F.R. § 1508.25(b)(3). Sometimes applicants—often particularly enlightened or well-advised applicants—will meet informally with government agencies prior to submission of an application to learn about and address those agencies' environmental concerns. (The CEQ NEPA Regulations encourage such early cooperation. *See* 40 C.F.R. §§ 1501.2(d), 1506.5(a), 1507.3(b)(1)

environmental consequences) requires discussion of "[m]eans to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f))." If another agency which also has jurisdiction over a project objects to the impacts discussed in the draft statement, that agency is required in its comments to "specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements . . . ." 40 C.F.R. § 1503.3(d) (1979). In this way the final statement can contain a fuller and more adequate discussion of the impacts and their ramifications, while the prospect of the second agency with jurisdiction issuing an unforeseen denial after the first agency has approved the project is averted.

Finally, when the lead agency makes its decision, it must state in its Record of Decision whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. 40 C.F.R. § 1505.2(c). The Regulation further provides:

> A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

Id. At minimum, these requirements force the decisionmaker to focus on the environmental process that has gone before and to reflect the teachings of that process

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(1979). These preapplication discussions may take place over many months. An applicant may choose to incorporate all the environmentally beneficial suggestions made by the agencies into the application before its formal submission (i.e., to include them in the "proposed action"). Unless public comment or further study results in additional such measures which the agencies then adopt, all of what the agencies would otherwise have imposed as mitigation will have been incorporated into the applicant's proposal, obviating the need for additional, discrete mitigation. Clearly this sort of public-private cooperation goes far to further NEPA's ends in a consensual, nonadversarial manner.

in his or her decision.[15] Finally, once an agency has adopted mitigation measures, 40 C.F.R. § 1505.2(c), the agency must see that such measures are in fact carried out. 40 C.F.R. § 1505.3.[16]

C. *Mitigation is an essential element of the actual operation of NEPA.*

An illustrative list of NEPA cases provides examples of how mitigation has been employed as part of project approval processes:

- Airport runway extension approved; mitigation involved a preferential runway use program to direct flights away from dense residential populations and changes to takeoff procedures such that aircraft overflew those populations at higher altitudes. *C.A.R.E. Now, Inc.* v. *FAA*, 844 F.2d 1569, 1571, 1575 (11th Cir. 1988). In its opinion the Court of Appeals observed:

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[15] The requirement also rescues NEPA from the charge of "useless paperwork" that arose shortly after the law's enactment by insuring that attention is paid to the environmental impact statement that Congress so expectantly created. *See supra* note 8.

[16] 40 C.F.R. § 1505.3, *Implementing the decision*, provides in pertinent part:

> Mitigation . . . and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:
>
> (a) Include appropriate conditions in grants, permits or other approvals.
>
> (b) Condition funding of actions on mitigation.
>
> (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.
>
> (d) Upon request, make available to the public the results of relevant monitoring.

> In conclusion, the utility of NEPA is apparent in this case. Without NEPA, the FAA would not likely have imposed mitigation measures as conditions for the completion of the runway extension. With NEPA, however, the FAA was forced to consider the environmental consequences of its actions. As a result, PDK will experience enhanced safety with insignificant environmental consequences due to the implementation of effective mitigation measures.

Id. at 1575.

- Dam construction allowed to proceed; mitigation included increasing minimum flows to preserve aquatic habitat and related fishery and obtaining borrow material from the reservoir site rather than from the downstream canyon bottom so as to preserve downstream water quality. *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1280, 1284 (9th Cir. 1974).
- Channel improvement; project may proceed contingent on approval by Court of mitigation summary covering such matters as areas to be preserved and provision for water supply. *Simmans* v. *Grant*, 370 F. Supp. 5, 20-22 (S.D.Tex. 1974).
- Shopping mall approved; mitigation involved detention basins for storm runoff which includes wetlands; new bed for creek; creation of compensatory wetlands. *Sierra Club* v. *Alexander*, 484 F.Supp. 455, 460, 468 (N.D.N.Y.), *aff'd*, 633 F.2d 206 (2d Cir. 1980).
- Office, commercial, and residential development approved; mitigation involved permanent protection for 86% of the habitat of an endangered butterfly.[17] *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d at 984.

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[17] The conservation plan in this case, the result of long and productive negotiations among affected interests, was described in a Congressional Committee report as a model for other such plans. *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 983 (9th Cir. 1985).

- Conversion of military airport to civilian uses; mitigation measures to deal with increased noise levels. *Davidson* v. *Department of Defense*, 560 F. Supp. 1019, 1029-31 (S.D.Ohio. 1982).
- Mineral exploration upheld in wilderness area; mitigation involved curtailment of helicopter flights and of overnight camping and seasonal restrictions on drilling activities. *Cabinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678, 680-684 (D.C.Cir. 1982).[18]

Supposedly mitigative conditions may, of course, fail to mitigate or the record may not afford adequate information concerning them. In such cases courts have required more detailed analyses of mitigation measures. In a case, for instance, where mitigation had been offered as justification for nonpreparation of an EIS,[19] Judge Wallace observed that "[t]he conditions contained in this permit . . . rather than mitigating environmental consequences, generally operate simply to defer important agency decision until more information has been obtained." *Jones* v. *Gordon*, 792 F.2d 821, 829 (9th Cir. 1986); *see Sierra Club v. Peterson*, 717 F.2d 1409, 1411,

[18] The *Cabinet Mountains* case also involved a distinct question on which there is a sharp division of authority and which is not presented in this proceeding—whether mitigation may without undermining NEPA be sufficiently total to obviate the need for an environmental impact statement. The CEQ has cast doubt on the practice. CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18038 (1981); *see Sierra Club* v. *Marsh*, 769 F.2d 868 (1st Cir. 1985). However, the practice has been upheld in four circuits. *C.A.R.E. Now, Inc.* v. *FAA*, 844 F.2d at 1575; *Louisiana* v. *Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985); *Cabinet Mountains*, 685 F.2d at 682; *Preservation Coalition, Inc.* v. *Pierce*, 667 F.2d 868, 874 (9th Cir. 1982). Despite the government's invitation, Briefs for the Petitioners in No. 87-1703 at 27, n.26, and in No. 86-1704 at 20, n.10, the question is not presented in the present cases, and they do not provide the appropriate occasions to address it.

[19] See *supra* note 18.

1415 (D.C. Cir. 1983) (department cannot delay preparation of EIS because of inadequate information if it is unable to preclude activities occurring during that delay which might have unacceptable environmental consequences). The sufficiency or insufficiency of mitigation can go to the very basis for the reasoned choice among alternatives which it is a purpose of NEPA to illuminate. In an early NEPA case the Eighth Circuit observed that "[t]he proposed mitigation plans go to the very heart of the question before the Corps in preparing its environmental impact statement—whether the project should proceed at the present time in view of its environmental consequences." *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972).[20] The EIS must necessarily examine the mitigation measures in detail, as any other aspect of environmental impact analysis is examined in the "detailed statement," NEPA, § 102(2)(C) that we have come to call an environmental impact statement. *See LaFlamme v. FERC*, 842 F.2d 1063, 1071 (9th Cir. 1988); *Northwest Indian Cemetery Protection Ass'n* v. *Peterson*, 795 F.2d 688, 697 (9th Cir. 1986); *see also The Steamboaters* v. *FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985); *cf. Texas Committee on Natural Resources* v. *Marsh*, 736 F.2d 262, 268 (5th Cir. 1984).

[20] It is not necessary to delve into larger and separate questions concerning the measure of NEPA's substantive obligations in addition to its essentially procedural mandate; Briefs for the Petitioner in No. 87-1703 at 21 *et seq.* and in No. 87-1704 at 15 *et seq.*; *see* 40 C.F.R. § 1500.1 (concerning procedural and substantive requirements of NEPA); CEQ, *Environmental Quality-1977* (Eighth Annual Report) at 119-121 (1977); in order to appreciate the central role that mitigation plays in the preponderance of environmental impact statements and processes.

In sum, while a "mitigation plan" is not required either by NEPA or by the CEQ Regulations in every case, mitigation is an essential element of NEPA, its implementing Regulations, and the day-to-day implementation of the Act. Indeed, in some cases such a plan may be needed, but not in all. In any event, appropriate mitigation must be examined in sufficient detail in an environmental impact statement to insure that the "action forcing" purposes[21] Congress intended are respected. The presence of the potential for judicial scrutiny deters those who would ignore or pay only lip service to those purposes, upsetting the balance which NEPA enables between environmental and developmental concerns. It is exactly this sort of scrutiny which the court below sought to apply in finding insufficient the mitigation measures proposed by the Corps in *Oregon Natural Resources Council* and by the Forest Service in *Methow Valley*. Requiring agencies to provide detailed analyses of mitigation measures and to explain the effectiveness of such measures does not necessarily mean, however, that agencies must on all occasions produce complete mitigation plans. Here, despite excessive language, the Ninth Circuit's holdings do properly recognize the significance of the mitigation element in a NEPA analysis, especially, as in the cases below, where the mitigation measures proposed by the agencies were so central to the agencies' final decisions.

Respectfully submitted,

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[21] *See supra* note 8.

AMICUS CURIAE

BRIEF

No. 87-1703, 87-1704

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, et al.,
Petitioners,

vs.

METHOW VALLEY CITIZENS COUNCIL, et al.,
Respondents.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, et al.,
Petitioners,

vs.

THE OREGON NATURAL RESOURCES, COUNCIL, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act ("NEPA") allows federal agencies to avoid detailed analysis of mitigation measures by merely listing mitigation "opportunities" in an environmental impact statement or by postponing evaluation of such measures until after proposed projects have been approved.

2. Whether federal agencies may escape strict compliance with NEPA's procedural requirements in defiance of the "rule of reason" standard adopted by the Council on Environmental Quality ("CEQ").

3. Whether federal agencies must continue to take a "hard look" at the potential costs and environmental consequences of proceeding in the face of uncertainty in accordance with the NEPA "common law" adopted by CEQ.

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No. 87-1703, 87-1704

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, et al.,
Petitioners,

vs.

METHOW VALLEY CITIZENS COUNCIL, et al.,
Respondents.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, et al.,
Petitioners,

vs.

THE OREGON NATURAL RESOURCES, COUNCIL, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

State of California, John K. Van De Kamp, Attorney General of California and the States of Alabama, Alaska, Colorado, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia and West Virginia

INTEREST OF AMICI

The twenty-eight states appearing as amici curiae herein have a vital interest in protecting their ability to participate meaningfully in the National Environmental Policy Act (42 U.S.C. §§ 4321 et. seq.; "NEPA") process. The federal agency petitioners are attempting to paint a gloss of extremism on the decisions of the court of appeals in an attempt to obscure their goal of dramatically weakening the obligation of all federal agencies to fully comply with NEPA. The Forest Service and the Army Corps of Engineers seek nothing less than to disturb the settled expectations of the states participating in the NEPA process.

The implementation of NEPA is a primary means by which states make their voices heard in the development of federal projects. The environmental impact research, review and disclosure procedure required by NEPA is essential to the states' abilities to plan for the consequences of federal actions.[1] Federal actions, both on and off the federal lands, significantly affect state resources, and increasingly state and local governments are asked to bear the burden of mitigating the consequences of these activities.

The states are particularly concerned with the outcome of these two actions because of the egregious violations of basic NEPA law committed by the federal agencies. In *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *cert. granted*, No. 87-1703 (June 27, 1988), the Forest Service allocated public lands to the construction of a major destination ski resort with significant adverse air quality and wildlife impacts. The environmental impact statement ("EIS") prepared for the project merely provides a *list* of mitigation "opportunities" that could be implemented by state and county governments or private landowners, without any estimate of their costs, any analysis of their effectiveness or any assurances that the mitigation measures

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[1] The legislative history of NEPA is replete with references about the need to involve state and local governments in the environmental planning and decisionmaking process. H. Rep. No. 378, 91st Cong., 1st sess. 3-4; H. R. Conf. Rep. No. 765, 91st Cong., 1st sess. 8-9; reprinted in 1969 U.S. Code Cong. & Admin. News 2751, 2753-54, 2769.

will be carried out. No specific mitigation measures were described in the Early Winters Environmental Impact Statement ("Early Winters EIS"), even though the Forest Service's regulations require the special use permit to contain terms and conditions which will "minimize damage . . . to fish and wildlife habitat and otherwise protect the environment." 36 C.F.R. § 251.56(a) (1988).[2]

In *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051 (9th Cir. 1987), *cert. granted*, No. 87-1704 (June 27, 1988), the U.S. Army Corps of Engineers ("Corps") failed to publicly review or analyze new information that challenged important assumptions in the Corps' prior environmental review *before* deciding to proceed with construction of the Elk Creek dam. A 1980 study by the U.S. Soil Conservation Service ("SCS") directly contradicted the Corps' assumptions regarding the turbidity of the water to be released from the Elk Creek dam. *Compare Elk Creek SEIS ("Elk Creek SEIS")* 74, with Borine Testimony, Transcript of January 16, 1986, Hearing on Motion for Preliminary Injunction 32-35, 46-47, 69. A 1985 study by the Oregon Department of Fish & Wildlife ("ODFW") found substantial increases in salmon mortality resulting from a similar Corps' project, Lost Creek dam, and requested more time to study the phenomenon. The Corps responded to this request with a Supplemental Information Report ("SIR") prepared three months *after* this litigation was commenced. The Corps also expressly postponed any study of the costs or effectiveness of mitigation measures for the project's destruction of 1,290 acres of wildlife habitat until after the final decision to build the dam was carried out. *Elk Creek SEIS* 6, Summary ¶ 3.

Should this Court decide that a federal agency need not evaluate the means by which impacts on state resources will be mitigated before deciding to go ahead with federal projects, it will sanction a "build now, study later" attitude in federal agencies. Similarly, a decision revoking the application of the "rule of reason" to the review of federal agency compliance with NEPA's

[2] *See also id.* at § 251.54(e)(4) (1988) (requiring mitigation plans to be submitted at the time of an *application* for a special use permit).

procedural requirements will diminish the ability of state agencies to obtain information about the real costs of mitigating federal actions. Without strict procedural compliance with NEPA, federal agencies will be allowed to treat the loss of state resources as insignificant issues that can be studied after the agency's decision to proceed is final and its development agenda is complete.

Amici urge this Court to reject the radical shifts in established NEPA practice sought by the federal agencies, and to support the states' settled expectations that federal agencies must take a "hard look" at the consequences of their actions and that the federal courts will strictly enforce federal agency compliance with NEPA.

STATEMENT OF THE CASE

Amici adopt respondents' statements of the cases.

SUMMARY OF ARGUMENT

1. NEPA's requirement of a detailed environmental impact statement is designed to evaluate means of avoiding harm to the environment. The statute's implementing regulations make discussion of mitigation measures in an EIS mandatory, and this Court's "hard look" doctrine requires that such measures be analyzed in detail to insure a fully-informed and well considered agency decision. Simply listing mitigation "opportunities" in an EIS or postponing any analysis of such measures until after a project has been approved violates NEPA's directives.

2. NEPA commands compliance with its "action-forcing" procedures "to the fullest extent possible." (42 U.S.C. § 4332.) This statutory standard governing NEPA's procedural requirements affords agencies less discretion than they have in their policy making roles reviewed under the standards of § 706 of the Administrative Procedure Act ("APA"). The Council on Environmental Quality ("CEQ") has adopted the traditional NEPA standard of review, "the rule of reason," and this Court should affirm CEQ's decision.

3. The Court should affirm CEQ's adoption of the NEPA "common law" governing federal agency obligations to take a "hard look" at the uncertain, but potentially severe, consequences of their actions.

ARGUMENT

The federal agencies petitioning this Court seek to change the fundamental premises of the NEPA planning process. The result sought by petitioners is an inversion of the basic NEPA principle to plan and study first, then decide and build after reasoned review of the information gathered. Both the Army Corps and the Forest Service attempt to avoid the "hard look" NEPA mandates by deciding to commit resources to their projects now, and leaving the study of the ultimate effects on fish, wildlife and air quality to a later date. Such actions fly in the face of Congress' intent in enacting NEPA to obtain better environmental decisions by insisting on a thorough and detailed planning process.

Even more radical is the federal government's thesis that agency compliance with NEPA's procedural requirements is delegated to agency discretion. NEPA achieves Congress' goals for the Nation's environment by commanding procedural compliance to the "fullest extent possible". Neither this Court nor any other has ever held that compliance with NEPA's procedures and the CEQ's implementing regulations lies within the agency's special expertise and in fact such a holding would be directly contrary to the purposes of Congress in crafting section 102 of the statute (42 U.S.C. § 4332). The Forest Service and Corps seek to obtain from this Court what they cannot obtain from Congress, a license to ignore NEPA's "hard look" when the agency views it to be inconvenient.

I

FEDERAL AGENCIES CANNOT AVOID NEPA'S REQUIREMENT OF A DETAILED STATEMENT BY SIMPLY LISTING MITIGATION "OPPORTUNITIES" IN AN EIS OR BY POSTPONING ANALYSIS OF MITIGATION MEASURES UNTIL AFTER A PROJECT HAS BEEN APPROVED

In both cases before the Court, federal agencies prepared environmental impact statements without discussing or analyzing mitigation measures. The agencies defend these omissions by stating that they can simply list mitigation "opportunities" in an EIS or defer preparation of the measures until after the projects have been approved. These positions are inconsistent with the spirit and letter of NEPA.

A. NEPA Is Designed To Minimize Harm to the Environment

NEPA was adopted by Congress in response to mounting concerns about the degradation of the nation's environment and the need to conserve our resources for future generations. *See* S. Rep. No. 296, 91st Cong., 1st sess. 4-6, 8-10, 16-17 (1969); H. Rep. No. 378, *supra*, at 3 (1969). As this Court has explained, the statute "announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by all practicable means, consistent with other essential considerations of national policy." *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976). "NEPA was designed to promote human welfare by alerting government actors to the effect of their proposed actions on the physical environment." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983).

NEPA sets forth significant environmental goals for the Nation. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *Metropolitan Edison Co.*, 460 U.S. at 772-73 ("NEPA states its goals in sweeping terms of human health and welfare."). Speaking in "bold strokes", *Andrus v. Sierra Club*, 442 U.S. 347, 349 (1979), Congress described the purposes of this Act as follows:

> "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 83 Stat 852, 42 U.S.C. § 4321.

Foremost among NEPA's objectives is the prevention of harm to the human environment. This Court has found that the intent of Congress is reflected in the remarks of two principal sponsors of NEPA: "'What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That *we will not intentionally initiate actions which do irreparable damage to the air, land and water* which support life on earth.' 115 Cong. Rec. 40416 (1969) (remarks of Sen. Jackson) (emphasis supplied)." Under NEPA, "'we can now move forward *to preserve and enhance our air, aquatic, and terrestrial environments* . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment.' *Id.*, at 40924 (remarks of Rep. Dingell) (emphasis supplied)," *quoted* in *Metropolitan Edison Co.*, 460 U.S. at 772-73.

NEPA's key, "action-forcing" requirement is the preparation of an environmental impact statement. For every major federal action significantly affecting the environment, agencies must prepare a detailed statement discussing the project's environmental impacts, adverse effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action. § 102(2)(C). This provision was intended to profoundly restructure the decisionmaking process of federal agencies:

> "The thrust of § 102(2)(C) is thus that environmental concerns be integrated into the very process of agency decisionmaking. The 'detailed statement' it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions [footnote]. If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of § 102(2)(C) would be lost." *Andrus v. Sierra Club*, 442 U.S. at 350-51.

Agencies must comply with this statutory directive—and all other requirements of NEPA § 102—to the "fullest extent possible." 42 U.S.C. § 4332; *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). This Court has explained that this language used by Congress "is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not to be shunted aside in the bureaucratic shuffle." *Id.*

B. CEQ's Regulations Require That Mitigation Measures Be Fully Discussed and Evaluated in an EIS

In 1978, the President ordered the Council on Environmental Quality (CEQ) to "issue regulations to Federal agencies for the implementation of the procedural provisions of the Act [NEPA] (42 U.S.C. § 4332(2)) . . ." Exec. Or. 11991(1), (1977). The regulations promulgated by CEQ are binding on all federal agencies. *Andrus v. Sierra Club*, 442 U.S. at 358.

CEQ's regulations emphasize meaningful disclosure and agency consideration of means to avoid environmental harm, including mitigation. Federal agencies are directed, to the fullest extent possible, to "identify and assess reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e) (1987). Decisionmakers must also affirmatively consider whether mitigation measures and other alternatives can be implemented; they are enjoined to "[u]se all practicable means . . . to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." *Id.* at § 1500.2(f)

CEQ's regulations attach considerable importance to mitigation measures, requiring that agencies discuss them at three separate points in the NEPA process: in defining the scope of an EIS (as an alternative to the proposed project), 40 C.F.R. § 1508.25(b); in the body of the EIS itself, *id.* at §§ 1502.14(f);

1502.16(h); and in the agency record of decision, *id.* at § 1505.2(c). In the EIS, mitigation measures are considered part of the agency's discussion of alternatives, which CEQ describes as "the heart" of the document. *Id.* at § 1502.14. Along with other alternatives to the proposed project, mitigation measures must be "rigorously explore[d] and objectively evaluate[d]," *id.* at § 1502.14(a), and presented in "comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* at § 1502.14.

Decisionmakers must be given sufficiently detailed information about the mitigation measures discussed in an EIS to decide whether or not to adopt them as part of the project.[3] Agencies are required to state in their final record of decision whether all practicable means to avoid or minimize environmental harm from the alternative selected, including mitigation, have been adopted, and if not, why not. *Id.* at § 1505.2(c). Where mitigation has been adopted, agencies must adopt (and summarize in the record of decision) a monitoring and enforcement program for such measures. *Id.*; *see also id.* at § 1502.1.

In adopting the NEPA regulations, CEQ clearly envisioned that an EIS would contain a thorough discussion of mitigation measures, including whether or not these measures will actually reduce a project's harmful impacts:

> "to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies." *Forty Most Asked Questions*, 46 Fed. Reg. 18032 (1981).[4]

[3] "An environmental impact statement is more than just a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." 40 C.F.R. § 1502.1 (1987).

[4] Although the courts have split on the question of whether CEQ's *Forth Most Asked Questions* constitutes controlling authority, *compare*

C. This Court's "Hard Look" Doctrine Requires a Full Discussion and Evaluation of Mitigation Measures in an EIS

This Court has endorsed NEPA's "common law"[5] command that agencies take a "hard look" at the environmental consequences before proceeding with a major action. *Kleppe v. Sierra Club*, 427 U.S. at 410 n. 21 (1976); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). An agency's "hard look" must be sufficient to satisfy NEPA's twin aims: first, of providing the agency with sufficient information about every significant aspect of the environmental impact of a proposed action to insure a "fully informed and well considered decision," *Vermont Yankee*, 435 U.S. at 553, 558; *Baltimore Gas & Electric*, 462 U.S. at 97; second, of ensuring that the agency will inform the public that it has considered environmental concerns in its decisionmaking process. *Id.*

Lower courts following this Court's directive and developing the NEPA "common law" have required that all significant components of an EIS be detailed and carefully analyzed.[6] This same standard governs mitigation, which is a mandatory element

Sierra Club v. Marsh, 769 F.2d 868, 874, 879 (1st Cir. 1985) (controlling authority) with *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985) *cert. denied*, 475 U.S. 1044 (1986) (contra), the CEQ document at least is "guidance" to agencies implementing the CEQ regulations.

[5] *See Kleppe v. Sierra Club*, 427 U.S. at 420-21 (Marshall, J., concurring).

[6] *E.g., Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (project impacts); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072-74 (1st Cir. 1980) (alternatives); *State of Alaska v. Andrus*, 580 F.2d 465, 474-75 (D.C.Cir. 1978), *vacated in non-pertinent part sub nom. Western Oil & Gas Association v. Alaska*, 439 U.S. 922 (1978) (alternatives); *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975) (history of success of similar projects).

The courts have consistently rejected EIS discussions which are superficial or unsubstantiated. For example, in *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 781-82 (9th Cir. 1980), Judge Kennedy explained that an EIS was inadequate because its discussion of several environmental impacts was "conclusory and abbreviated." *Id.* at 782 n. 3. "We conclude that the EIS fails to give decisionmakers who

of an EIS, and which must be fully described and evaluated to insure a fully informed and well considered agency decision.

D. The Forest Service and Corps of Engineers Have Failed to Satisfy NEPA's Requirements

The federal petitioners concede that a federal agency must consider mitigation measures in assessing the environmental consequences of a proposed action. *E.g.*, Fed. Pet. *Robertson* Br. 25. They also acknowledge that an EIS must contain sufficient data to permit a well reasoned agency decision. *Id.* But they urge the Court to adopt a standard for discussion of mitigation which is so lenient that it would grant to agencies the ability to act now and analyze the environmental consequences later—precisely the approach which NEPA has rendered unacceptable.

Moreover, the federal government's heated attacks on the court of appeals veil its blatant attempt to curtail agency obligations under NEPA. In neither *Methow Valley* nor *Marsh* did the court of appeals intrude into the realm of agency decisionmaking and order the Forest Service or the Corps of Engineers to undertake mitigation actions. Each holding reviews solely the quality of information agencies must provide to satisfy NEPA's mandate. On this question, the court of appeals properly followed the prior directives of this Court.[7]

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are removed from the initial decision sufficient data from which to draw their own conclusions about air, noise and water pollution." *Id.* at 782.

[7] Petitioners have seized on the court of appeals' dicta in *Methow Valley* and in *Marsh* to portray the decisions as significantly enlarging the responsibilities of federal agencies under NEPA. These decisions actually implement traditional NEPA procedural requirements, and are not founded on any substantive duty to mitigate environmental harm.

In *Marsh*, the court of appeals ruled that the "mere listing" of mitigation measures is insufficient to satisfy the regulatory requirement that an EIS discuss mitigation measures. 832 F.2d at 1493. As authority for these requirements, the court relied on an earlier Ninth Circuit precedent, *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 108 S.Ct. 1319; ____ U.S. ____ (1988). *Peterson* found that the discussion of mitigation measures proposed for timber harvesting in Six Rivers National Forest was insufficiently detailed "to qualify as the reasoned discussion

1. The Listing of Mitigation "Opportunities" in an EIS is Inconsistent with CEQ's Regulations and This Court's "Hard Look" Doctrine

Federal petitioners declare that federal agencies need only discuss mitigation "opportunities" in an EIS. This unsupported position is nothing more than a rewrite of CEQ's regulations, which elsewhere the federal government describe as "carefully crafted", Fed. Pet. *Marsh* Br. 23, and entitled to substantial deference, *id.* at 33. The regulations require that mitigation *measures* be discussed, 40 C.F.R. §§ 1502.14(f); 1502.16(h) (1987), and with good reason. "Opportunities" for mitigating a project may be legion, especially if they involve outside parties, such as state and local governments, absorbing the costs. The identification of such opportunities does little to insure that decisions which have irreversible consequences are undertaken with full knowledge of their impact on the environment, as NEPA mandates. *See* S. Rep. No. 296, *supra*, at 9 ("One of the major factors contributing to environmental abuse and deterioration is

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required by NEPA." *Id.* (quoting *Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982).) *Peterson* thus turned solely on the agency's failure to fulfill its prodedural mandate under the statute.

As a further rationale for its ruling, the court of appeals in *Marsh* explained that without sufficient details about the mitigation plan, "the decisionmaker is unable to make an informed judgment as to the environmental impact of the project—one of the main purposes of an environmental impact statement." *Marsh*, at 1493-94 (citation omitted).

The court did not base its holding on any substantive duty to avoid harm under NEPA and did not require that any particular mitigation measures be adopted for the project (or that mitigation be adopted at all). The court discussed the standards for an adequate discussion in an EIS, which is the traditional role for courts under NEPA.

Methow Valley essentially elaborates on the well-established procedural requirements which the court described in *Marsh*. State amici agree that the court's initial dicta that NEPA requires that "actions be taken to mitigate the adverse impacts of federal actions," 833 F.2d at 819, is not supported by the case law. However, as in *Marsh*, the court's actual holding reviews only the level of detail required in an EIS, and does not require any affirmative steps by federal decisionmakers.

that actions—often actions having irreversible consequences—are undertaken without adequate consideration of, or knowledge about, their impact on the environment.").

The federal agencies additionally propose that so long as an EIS catalogs mitigation techniques, even if these are "general" and "conceptual in nature", an agency will have satisfied its "hard look" obligations. Fed. Pet. *Robertson* Br. 17, 31. The agency is under no duty to amplify what the mitigation measures will consist of or evaluate them for effectiveness prior to a decision being made. This is patently inconsistent with NEPA's requirements.

Simply listing mitigation measures in an EIS is meaningless to decisionmakers and the public. The fact that mitigation measures are theoretically possible discloses nothing about their monetary (or other) costs; the time involved in their implementation; the degree to which they have been used or been successful in the past; or the likelihood that they will actually work as proposed and reduce or compensate for a project's adverse impacts.[8] Worse, readers of an EIS are likely to interpret the listing of possible mitigation measures as indicating that there are realistic options for minimizing environmental damage.

Discussion of mitigation measures is mandatory under the CEQ regulations. Mitigation is a critical, indeed sometimes the

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[8] Amici's concern about mitigation measures that fail to fulfill their stated objectives is far from theoretical. For instance, many mitigation measures for wetland fill projects are unsuccessful. *See, e.g.*, Quammen, *Measuring the Success of Wetlands Mitigation*, 1986 Proceedings of the National Wetland Symposium: Mitigation of Impacts and Losses 242, 243 [hereinafter National Wetlands Symposium]; Walker, *A Review of Past Mitigation Projects in Florida*, National Wetlands Symposium 256, 257; Reimold & Thompson, *Wetland Mitigation Effectiveness*, National Wetland Symposium 259, 260. This is true for a variety of projects affecting natural resources. *See* Blumm and Kloos, "Small Scale Hydropower And Andromous Fish: Lessons And Questions From The Winchester Dam Controversy", 16 *Envtl. L.* 583, 615-617 (1986) (describing failure of mitigation measures for small-scale hydropower project to protect against damage to salmon and steelhead populations).

only, way that harm from a project can be avoided. Moreover, decisionmakers may rely on mitigation to justify a decision that a project's environmental costs are acceptable,[9] or to attempt to dodge a more complete evaluation of adverse environmental impacts.[10] In short, mitigation is an integral element in determining whether, and to what extent, a project will significantly damage the environment. Thus, to ensure that decisionmakers are fully apprised of the true environmental losses from proposed activities, and that an EIS provide "full and fair discussion" of all significant impacts, 40 C.F.R. § 1502.1 (1987), mitigation measures must be spelled out in detail and evaluated in an EIS.[11]

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[9] In *Methow Valley* for instance, the agency's Record of Decision provides that the project's severe effects on mule deer (*Early Winters EIS* 76), would be mitigated. (*See* ROD 3a: "No major adverse effects will result directly from the Federal Action."). The Early Winters EIS provided no basis for making this statement or for the Forest Service's reliance upon it in the decisionmaking process.

[10] *See National Wildlife Federation v. U.S. Forest Service*, 592 F.Supp. 931, 943 (D.Or. 1984) (Forest Service improperly relied on prior mitigation technique, which was only partially successful, to avoid more complete discussion of damage to fish habitat likely to result from timber harvesting).

[11] NEPA's requirement that agencies discuss mitigation measures in an EIS has not been extensively discussed in prior case law. Notably, however, there is no authority in the other circuit courts of appeal which supports the federal agencies' argument that a mere listing of mitigation "opportunities" is sufficient to comply with the statute. The cases dealing with mitigation reveal (1) a judicial recognition of the importance of mitigation measures, and (2) an assumption that there must be an analysis of mitigation measures before a project goes forward. *See Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972) ("The proposed mitigation plans go to the very heart of the question before the Corps in preparing its environmental impact statement—whether the project should proceed at the present time in view of its environmental consequences".); *Duck River Pres. Ass'n v. TVA*, 410 F.Supp. 758, 766 (E.D. Tenn. 1974), *aff'd mem.* 529 F.2d 524 (6th Cir. 1976); *Simmans v. Grant*, 370 F.Supp. 5, 20 (S.D.Tex. 1974).

Other cases upholding impact statements have nonetheless recognized that there must be an adequate discussion of mitigation measures in an

The manner in which agency ignorance about mitigation measures frustrates fully informed decisionmaking is vividly illustrated in the two cases before the Court. In approving the Elk Creek dam, the Corps treated mitigation as an afterthought. The agency's entire discussion of mitigation for the loss of wildlife habitat caused by the proposed dam is contained in a single paragraph. *See Elk Creek SEIS* 6.

A number of commenters—including state and federal agencies, members of the timber industry, and the general public—complained that they could not evaluate the environmental costs of the project without knowing details about the mitigation plan, particularly how much land it would involve and what the ultimate impacts on wildlife would be.[12] The U.S. Fish and Wildlife Service (FWS), for instance, noted:

> "The 'compensation plan' for wildlife will be developed in 'cooperation with the Oregon Department of Fish and Wildlife Service.' We believe compensation is of such great importance as a measure toward mitigating wildlife habitat losses, it should be shown as a firm plan. *Otherwise no one can tell if it really would compensate.*" *Elk Creek SEIS* 104 (emphasis added).

The Southern Oregon Timber Industries Association similarly explained:

> "The project will eliminate valuable winter range for deer. However, there is no assessment of the impact of the mitigation measures. Some agricultural and timber land will undoubtedly be involved in the mitigation efforts. Both timber and agricultural values will be lost in the trade off. These costs need to be determined and entered in the cost benefit analysis." *Id.* at 95.

EIS. *See, e.g., Trout Unlimited v. Morton*, 509 F.2d 1276, 1284 (9th Cir. 1974); *Davison v. Dep't of Defense*, 560 F.Supp. 1019 (S.D.Ohio 1982).

[12] *See, e.g., Elk Creek SEIS* 69 (comments of Oregon Department of Fish and Wildlife: "It isn't known yet if there is enough suitable land within the project to provide adequate compensation."); *id.* at 57 ("How can the mitigation cost be figured in when the plan has not been completed?"); *see also id.* at 85-86, 142.

Ironically, the Corps itself recognized that without a developed mitigation plan it could not accurately assess the environmental impacts or monetary costs of the Elk Creek Lake dam. In response to a letter from Congressman Jim Weaver, the Corps stated "[s]ince an approved mitigation plan for wildlife has not been completed, an accurate delineation of wildlife impacts cannot be portrayed." *Id.* at 132. Elsewhere the Corps noted that "upon authorization of further studies", a wildlife mitigation plan would be developed, and "[a]t that time, the relative benefits and impacts of alternative measures considered would have to be weighed." *Id.* at 86. The Corps further acknowledged in the SEIS that "[a]n accurate determination of mitigation costs cannot be calculated without the development of [a mitigation] plan." *Id.* at 58.

Similarly, the Early Winters EIS relies on a variety of actions by state and local governments, including zoning ordinances, development restrictions, tax incentives, and air quality regulations, to mitigate the project's off-site impacts on air quality and wildlife. Fed. Pet. *Robertson* Br. 32-35. Yet all of these measures are listed only as "opportunities" in the document. As the court of appeals correctly noted, there is no guarantee in the EIS or the Record of Decision that these measures would ever be implemented or even adopted. *Methow Valley*, 833 F.2d at 819-820.[13] Moreover, there is no evaluation of their likely effectiveness or the costs to local governments of implementing and enforcing these measures, and thus no way for local residents (among others) to judge the ultimate monetary and environmental burdens they will bear due to the project.

CEQ's regulations mandate that an EIS "shall provide full and fair discussion of environmental impacts". 40 C.F.R. § 1502.1 (1987). The regulations demand accurate information, of "high quality," *id.* at § 1500.1(b), that can assist decisionmakers in making a reasoned decision. Both the Corps' five sentence "discussion" of mitigation proposals in the Elk Creek SEIS and the

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[13] The Memorandum of Understanding (MOU) among the Forest Service and state and county governments outlining possible mitigation measures, upon which the Forest Service heavily relies, allows any party to withdraw from the agreement on thirty days notice. *MOU* 2, ¶ 9.

Forest Service's complete reliance on mitigation "opportunities", without any supporting analysis in the Early Winters EIS, fall drastically short of these directives.

2. Postponing Analysis of Mitigation Measures Until After a Project Has Been Approved Violates NEPA

The federal government also suggests that agencies must be afforded broad discretion in identifying the scope and timing of mitigation measures.[14] Basically, this is an ill-disguised effort to defer study of mitigation until after a project is underway, which directly conflicts with the basic premise of NEPA—that decisionmakers act with full knowledge of the environmental consequences of federal activities. *See Vermont Yankee*, 435 U.S. at 558; 40 C.F.R. § 1500.1(b) (1987) ("NEPA procedures must insure that environmental information is available to public officials before decisions are made and before actions are taken."); *id.* at § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.").[15]

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[14] *See, e.g.*, Fed. Pet. *Marsh* Brief 19: "The government has broad discretion to determine the form and scope of the mitigation discussion in light of the particular circumstances."

[15] Contrary to petitioners' suggestions (Fed. Pet. *Marsh* Br. 24-25), the case law does not establish that an agency may defer meaningful discussion of mitigation pending future planning or the development of additional information. One line of cases petitioners cite, *Concerned Citizens on I-190 v. Secretary of Transportation*, 641 F.2d 1 (1st Cir. 1981), *Township of Springfield v. Lewis*, 702 F.2d 426 (3d Cir. 1983), and *National Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981) turns on what changes trigger the need for a subsequent EIS. Certainly agencies may add new mitigation measures or improve those proposed as a project develops, but this must be in addition to, not a substitute for, detailed mitigation measures at the time the project is approved.

The other line of authority petitioners cite, *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977) *cert. denied*, 434 U.S. 1064 (1978), and *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), is inapposite to the cases before the Court. These decisions allow agencies to discuss mitigation measures in a general fashion at the programmatic stage of environmental review, while requiring specific discussion of mitigation measures at the final "go/no-go" stage of NEPA review. In both *Methow Valley* and *Marsh*, however, the EISs challenged are the final NEPA review for the projects proposed by the agencies. *See* discussion *infra*.

In both cases before this Court, the federal agencies contend that they should be allowed to rely on post-hoc preparation of mitigation measures. Fed. Pet. *Marsh* Br. 24; *Robertson* Br. 31-32. Of course, it was the unwillingness of Congress to accept assurances that agencies with competing programmatic missions would develop such measures which prompted the need for NEPA in the first place:

> "All agencies which undertake activities relating to environmental values, particularly those values relating to amenities and aesthetic considerations, are authorized and directed to make efforts to develop methods and procedures to incorporate those values in official planning and decisionmaking. In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors." S. Rep. No. 296, *supra*, at 20.

In *Marsh*, the Elk Creek dam was ratified by the Corps even though the SEIS explicitly stated that measures to compensate for the project's impacts on wildlife habitat were to be developed in the future, based on an as-yet unfinished study. *Elk Creek Lake SEIS* 6. Yet the Corps' approval is unambiguously the final decision point allowing construction of the dam to proceed.

In *Robertson* the Forest Service acknowledges that the Early Winters EIS failed to disclose any specific measures to mitigate the adverse air quality and wildlife impacts stemming from the project. *See* Fed. Pet. *Robertson* Br. 31-32. The federal agencies argue, however, that a general discussion of potential mitigation "opportunities" is appropriate because the Forest Service's action will be followed by later review of the project. *Id.* at 31-35. This is a highly misleading characterization of the Forest Service's review process.

The Forest Service's issuance of the special use permit is the transfer of the right to occupy and use National Forest System lands or facilities for the specified purposes. 36 C.F.R. § 251.55 (1988). This approval is the agency's *final* land use allocation decision, Fed. Pet. *Robertson* Br. 4 n.4, and therefore the point at which the irretrievable commitment of resources occurs. The Early Winters EIS is the final NEPA review of the Forest Service's land use decision.

For this reason, NEPA's "tiering" regulations, and the accompanying NEPA case law, are inapposite. "Tiering" contemplates a program of staged development from a general policy proposal to a site specific proposal, *see Kleppe*, 427 U.S. at 410-411; *see also* 40 C.F.R. § 1508.28, in which each stage of the federal action will trigger formal NEPA review. *Village of False Pass v. Clark*, 733 F.2d at 609; *see also Secretary of the Interior v. California*, 464 U.S. 312, 338 (1984). With "tiered" projects, the programmatic EIS precedes any irretrievable commitment of natural resources; here, by contrast, the allocation of resources occurs before any subsequent review by the Forest Service.[16]

The Forest Service's failure to discuss or evaluate specific mitigation proposals is particularly insupportable since special use permits approved by the agency must include mitigation measures to protect the affected environment. 36 C.F.R. §§ 251.54, 251.56 (1988). By the Forest Service's own regulations, therefore, mitigation is part of the project under review. No one would seriously argue that a partial project description, subject to later addition,

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[16] Whatever post-hoc review may be undertaken for the project's on-site impacts, there will be no further review whatsoever for the project's off-site effects, which the Forest Service acknowledges are the most severe (Fed. Pet. *Robertson* Br. 8-9) and which state and local governments are expected to mitigate. The federal agencies suggest that because mitigation for off-site impacts is beyond the Forest Service's control, the agency's obligation to fully disclose and evaluate off-site mitigation measures is somehow diminished. Fed. Pet. *Robertson* Br. 32-34. The CEQ regulations, however, provide no distinction in the level of detail governing an agency's discussion of off-site as opposed to on-site effects. *See* 40 C.F.R. § 1502.16 (1987).

complies with NEPA, but that is exactly the proposition being urged on this Court by the federal agencies.

In both the Elk Creek and Early Winters projects, the agencies gave no more than a cursory glance to mitigation for the project's adverse impacts. By attempting to excuse themselves from any analysis of mitigation measures, the federal agencies are arguing that it is proper for decisionmakers to proceed in ignorance of whether significant adverse impacts can or will be reduced if a project goes forward. This position is contrary to the fundamental premise of NEPA, and should be rejected by the Court.

II

THE ARMY CORPS VIOLATED THE RULE OF REASON IN FAILING TO CONSIDER SIGNIFICANT NEW INFORMATION CONCERNING THE ELK CREEK DAM

In defending the Army Corps' refusal to prepare a supplemental environmental impact statement (SEIS),[17] the federal petitioners attempt to undermine the principles of NEPA in two fundamental ways: first, the federal petitioners argue that agency compliance with NEPA's procedural requirements is subject to judicial review under the discretionary "arbitrary and capricious" standard rather than the traditional NEPA standard of the "rule of reason" endorsed and adopted by the CEQ[18]; second, the

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[17] The CEQ's regulations implementing NEPA's procedural mandate require a federal agency to prepare a supplemental environmental impact statement whenever "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its consequences." 40 C.F.R. § 1502.9(c)(1)(ii)(1987).

[18] The rule of reason requires agencies to comply with NEPA's procedural requirements to the extent necessary to fulfill NEPA's mandate for full environmental disclosure. *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir. 1985). In the context of an agency's decision not to prepare a supplemental EIS, the courts have stated that, "[r]easonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and

federal petitioners assert that the Corps satisfied NEPA's procedures by considering new information in a document prepared not merely *after* the final decision to proceed had been made, but *after* the initiation of this litigation. This Court should reject these extraordinary attempts by the federal agencies to undermine NEPA's procedural mandate as interpreted by the CEQ.

A. NEPA Commands Agencies to Act Reasonably in Their Application of NEPA's Procedural Requirements

The CEQ has expressly adopted the "view that adequacy of the content of the EIS should be determined through a use of a rule of reason." 51 Fed. Reg. 15621 (1986), *citing, Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).[19] Yet federal petitioners promote the view of three errant courts of appeal that still apply the "arbitrary and capricious" standard of review to compliance with NEPA regulations.[20] Such an assertion is a

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evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021-1024 (9th Cir. 1980).

[19] The CEQ has recently reiterated its adoption of the "rule of reason" in its revised regulations governing agency disclosure and examination of uncertainty. 51 Fed. Reg. 15618 (1986). The "rule of reason" was codified in CEQ's binding regulations implementing NEPA's procedural mandate. 43 Fed. Reg. 55978, 55983 (1978). The "rule of reason" is most often articulated as holding agencies to "reasoned" decisionmaking and requiring that a "reasonable" range of alternatives be examined. *See* 40 C.F.R. §§ 1500.6, 1502.14 (1987).

[20] The majority of circuit courts of appeals apply the "reasonableness" standard of review to agency compliance with NEPA's procedural requirements. The seminal case discussing NEPA's procedural mandate is *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C.Cir. 1971). Following the lead of the CEQ and early NEPA common law are the following circuit courts of appeal: *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-466 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1319-20 (8th Cir. 1974); *Township of Lower Alloways Creek v. Public Service Electric and Gas Co.*, 687 F.2d 732, 740-742 (3d Cir. 1982); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980);

direct contradiction of CEQ's adoption of the "rule of reason" and is not in keeping with NEPA's command for compliance "to the fullest extent possible."[21]

Section 101 of NEPA "announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals. . . . " *Kleppe v. Sierra Club*, 427 U.S. at 409. Section 102, which spells out the statute's procedural requirements is, in the words of this Court, the "*action-forcing*" provision of the statute "intended as a directive to 'all agencies to assure consideration of the environmental impact of their actions in decision-making'." *Id.* (citations omitted) (emphasis added).

NEPA's mandatory language and admonition to comply with section 102's procedural requirements "to the fullest extent possible" have dictated a more searching standard of judicial review for agency compliance with NEPA's procedural requirements than for agency policy decisions. Although agencies may retain a broader discretion when they make substantive policy decisions, they must meet NEPA's command for strict procedural compliance in the execution of their NEPA duties under section 102.[22]

Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); *National Wildlife Federation v. Marsh*, 721 F.2d 767, 782 (11th Cir. 1983). *See also* Justice White's dissents to the Court's denials of certiorari in *Gee v. Boyd*, 471 U.S. 1058 (1985) and *River Road Alliance v. Army Corps of Engineers*, 475 U.S. 1055 (1986). *But see, Town of Orangetown v. Gorsuch*, 718 F.2d 29 (2d Cir. 1983) *cert. denied*, 465 U.S. 1099 (1984); *Providence Road Community Assoc. v. Environmental Protection Agency*, 683 F.2d 80 (4th Cir. 1982); *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445 (7th Cir. 1985), *cert. den.*, 475 U.S. 1055 (1986).

[21] *See also* Exec. Or. 11991(2), 3 CFR 123 (1978).

[22] This Court has left little doubt that agencies' substantive decisions, whether to proceed or not to proceed with a proposed action, are discretionary decisions reviewed for arbitrariness under section 706 of the APA. *Vermont Yankee*, 435 U.S. at 558; *Baltimore Gas and Electric*, 462 U.S. at 98. Petitioners argue that this Court's decisions in *Vermont Yankee* and *Baltimore Gas & Electric* have decided the standard of review for federal agency compliance with section 102 and

In fulfillment of NEPA's mandate, the CEQ has directed the application of the "rule of reason" to agency compliance with its procedural implementation of NEPA. 50 Fed. Reg. 32236 (1985); 51 Fed. Reg. 15621 (1986). The CEQ has endorsed the "rule of reason" as traditionally articulated by the courts.[23] The CEQ has informed agencies that "[i]mplicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures 'to the fullest extent possible'." 50 Fed. Reg. 32237 (1985) *citing, Scientists' Institute for Public Information v. AEC*, 481 F.2d at 1092. The mandatory nature of NEPA's command for procedural compliance dictates that federal agencies' implementation of NEPA procedure be "reasonable".

Under NEPA, the courts are called upon to review agency action on two levels; first, for compliance with NEPA procedure as directed by the CEQ and NEPA itself; and second, for the agency's substantive decisions, or policy making decisions, to proceed or not to proceed with proposed actions.[24] The CEQ has

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CEQ's procedural regulations. Fed. Pet. *Marsh* Br. 37. Petitioners err because *Vermont Yankee* and *Baltimore Gas & Electric* both arose from the Atomic Energy Commission's rule-making process and did not involve any questions concerning NEPA's mandate to comply with its procedural requirements to the "fullest extent possible." Congress has set the standard for agency compliance with section 102 of NEPA at "the fullest extent possible." This standard does not allow broad agency discretion in compliance with NEPA procedures, rather it commands "reasonableness" at a minimum. *Calvert Cliffs' Coordinating Committee*, 449 F.2d at 1112-1115.

[23] The CEQ has specifically endorsed the rationale and holdings of the following cases: *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123 (5th Cir. 1974); *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983). 50 Fed. Reg. 32237 (1985). The CEQ's regulations embody "[a] combination of agency practice, judicial decisions and CEQ guidance." 50 Fed. Reg. 32235 (1985).

[24] Federal petitioners attempt to blur the distinction between agency compliance with NEPA's procedural mandate to create an environmental full disclosure document and the agency's discretion to determine agency actions after complete environmental review. Fed. Pet. *Marsh* Br. 38. In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), this Court held that the decision of the NHTSB to proceed with the portion of the highway going through a park was to be held to an "arbitrary and capricious" standard of review. In *Overton Park* the agency's decision was a substantive one, based upon the record already developed by the agency. The agency's record was reviewed by the Court to determine whether it reflected the agency's "hard look" at the requirements of two federal statutes. The arbitrary and capricious standard was not applied to the agency's threshold decision whether or not to comply with the statutes in the first instance, which the Court said was subject to a "thorough, probing, in-depth review." 402 U.S. at 415. Neither should that standard be applied to agencies' threshold decisions to comply with NEPA's procedural obligations to prepare an EIS, supplement an EIS, or otherwise comply with the CEQ's regulations.

recognized the distinction between procedural implementation of the NEPA mandate and the use of the NEPA process in agency decisionmaking. 43 Fed.Reg. 55985-86 (1978) (explaining the role of the agency's record of decision as the "link" between NEPA's procedural requirements and agency policy decisions). Agencies are entitled to deference in their policymaking roles, but not when they are commanded by Congress to follow NEPA's regulatory procedures.

Contrary to the assertions of federal petitioners, compliance with NEPA procedure is not an area requiring the application of an agency's scientific expertise.[25] When agencies are applying

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[25] To support this assertion, federal petitioners refer to a single statement in *Kleppe v. Sierra Club*, 427 U.S. 412. Fed. Pet. *Marsh* Br. 36. The Court's statement does not refer to agency implementation of NEPA procedures and was made without the benefit of CEQ's interpretive regulations. The agency is not interpreting its own enabling statute or regulations when it undertakes its procedural duties under NEPA. Therefore, the deference due an agency interpreting its own regulations is not applicable here. Congress has mandated that all federal agencies comply "to the fullest extent possible" with NEPA's procedural mandate, the CEQ has adopted interpretive regulations binding on all federal agencies, and the CEQ has chosen the traditional standard of "rule of reason." The statute and the CEQ regulations constitute additional law to be applied to all agencies in fulfilling their NEPA obligations.

NEPA's regulatory procedures to their proposed activities they are applying law, not policy, to facts generated by agency expertise. Congress has commanded that agencies perform this law applying function "to the fullest extent possible"—a statutorily mandated standard stricter than that imposed by the APA.

An agency's determination of what information is "significant" is an application of NEPA law and the CEQ regulations to the facts before it. The term "significant" is defined by the CEQ's regulations, and the agency is required to apply that definition and NEPA law to the facts before it. *See* 40 C.F.R. § 1508.27 (1987). The application of NEPA's procedural mandate to a factual record is not an agency policymaking act; it is a judgmental process that must give life to the purposes of NEPA and the letter of the CEQ regulations "to the fullest extent possible." NEPA itself commands a higher standard of review to enforce its mandate for more reasoned decisionmaking. This Court should affirm CEQ's adoption of the "rule of reason" and ensure that federal agencies act "reasonably" in following NEPA's procedural regulations.

B. The Army Corps Acted Unreasonably in Failing to Consider New Information Before Its Final Decision to Build Elk Creek Dam

The original EIS for the Elk Creek dam was prepared by the Army Corps in 1971. The project was postponed for ten years as a result of the water quality and fishery impact problems. In 1980, the project was resurrected and a supplemental EIS prepared on the new information on impacts to wildlife and water quality. Five years later, new information regarding the dam's potential impacts on water quality, salmon and steelhead survival was developed by the Oregon Department of Fish and Wildlife as a result of studies conducted on the Corps' Lost Creek dam. Fed. Pet. *Marsh* Br. 3a. The final ODFW report projected a 30 to 45 percent decrease in salmon fry survival rate upon the closure of the Elk Creek dam and projected impacts on the Rogue River fishery at the closure of Elk Creek dam that could be significant. Fed. Pet. *Marsh* Br. 9a.

However, the Corps did not consider either the draft or final ODFW reports before making its final decision to proceed with dam construction without preparing a supplemental EIS. *Marsh*, at 1494. The only record of the agency's consideration of the Oregon Department of Fish and Wildlife's information is the Corps' SIR. Fed. Pet. *Marsh* Br. 39-40. The Corps prepared the SIR *after* its decision to proceed with the dam construction was challenged in court. Not only does the SIR fail to provide consideration of new information prior to the final decision to proceed with the project, the SIR can only be viewed as a post hoc rationalization of the decision already made by the agency.[26] The Corps' actions belie any attempt to comply with the CEQ regulations.

In addition, in 1982 the U.S. Soil Conservation Service had prepared a study on the soil in the Elk Creek area and found its type and texture was different from that *assumed* by the 1980 Elk Creek SEIS. *Marsh*, at 1496. The new soil classification indicated that the soil in the Elk Creek watershed would contribute to turbidity to a much greater extent than previously assumed by the Corps' 1980 Elk Creek SEIS. The Corps, however, did not review the SCS turbidity study in deciding whether there was significant new information warranting a supplement to the 1980 SEIS. *SIR*, Fed. Pet. *Marsh* Br. 3a. In its post hoc rationalization developed for this Court, the agency continues to rely exclusively on its model based on the Lost Creek soil types and its proposed mitigation measures.[27]

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[26] Administrative findings prepared after the time of the decision are to be viewed critically. *Citizens to Preserve Overton Park*, 401 U.S. at 419-421. The Army Corps' SIR was prepared not merely *after* its decision to proceed, but three months after the initiation of this litigation and days before the preliminary injunction hearing in this case. The SIR so heavily relied upon by the Corps to justify its failure to prepare a supplemental EIS is little more than a litigation affidavit and should be viewed, at best, with suspicion.

[27] Petitioners' brief admits that the Corps' decision not to supplement the SEIS was based partially on "management" techniques to reduce turbidity. Fed. Pet. *Marsh* Br. 43. Despite the fact that the effectiveness of these measures had never been analyzed, the Corps relied on these

As the *Marsh* case illustrates, compliance with NEPA's procedural requirements cannot be left to agency discretion without minimizing the Congressional goals of better and more informed environmental decisionmaking. Reviewing courts must be allowed to determine whether the agency's rejection of new information was "reasonable"; to do otherwise risks allowing federal agencies to shape the NEPA process to conform to their own convenience and hamper the ability of states and the public to effectively participate in the federal environmental planning process. This Court should affirm the application of the "rule of reason" to agency compliance with NEPA's procedural requirements and reject the Army Corps' reliance on post hoc rationalizations.

III

NEPA AND CEQ REQUIRE A DETAILED ANALYSIS OF THE COSTS AND CONSEQUENCES OF PROCEEDING IN THE FACE OF UNCERTAINTY

NEPA's most fundamental premise requires that federal agencies evaluate the future consequences of today's decisions, including those future consequences that cannot be known for certain. While NEPA does not hinder an agency's ability to proceed in the face of uncertainty, it does require federal agencies to disclose the risks and potential consequences of doing so. 40 C.F.R. § 1502.22 (1987); *see also* 50 Fed.Reg. 32234-38 (1985) and 51 Fed.Reg. 15618-26 (1986).

In these two cases, the federal agencies make much of the court of appeals' reliance on CEQ's "worst case analysis" regulations. For the amici states, however, the crucial point is not the label attached to the process for addressing uncertain future impacts, rather amici urge this Court to affirm CEQ's determination that federal agencies bear a continuing obligation to disclose the risks and potential consequences of proceeding in the face of uncertainty.

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techniques to proceed with the project, as well as a reason not to gather and disclose new information. In so doing, the Corps has improperly used the mere possibility of mitigation measures to cloak the environmental consequences of the Elk Creek project. *See* discussion *supra*.

In 1980, the CEQ developed the "worst case analysis" as the procedure for agencies to take a "hard look" at uncertainty and thus comply with NEPA's command that agencies examine the potential consequences of proceeding in the face of uncertainty. 40 C.F.R. § 1502.22 (1980); 43 Fed.Reg. 55984, 55997 (1979). In 1986, the CEQ revised its "uncertainty" regulation by supplanting the "worst case analysis" procedure with a "summary of existing credible scientific evidence which is relevant to evaluating reasonably foreseeable significant adverse impacts on the human environment" and evaluation of "the impacts based upon research methods generally accepted in the scientific community." 40 C.F.R. §§ 1502.22(b)(3),(4)(1987). In both the "worst case" regulation and in the new "uncertainty" regulation, CEQ has done nothing more than codify existing NEPA law which requires that federal agencies disclose and analyze the costs of uncertainty.

The states appearing as amici herein, urge this Court to recognize and affirm CEQ's codification of this NEPA "common law" governing agency obligations to take a "hard look" at the risks of proceeding in the face of uncertainty. In its restructuring of the uncertainty regulation, CEQ specifically relied upon and adopted the basic principles of NEPA as enunciated by the courts. Thus, CEQ confirmed that "one of the costs that must be weighed by decisionmakers is the cost of uncertainty—i.e. the costs of proceeding without more and better information." 51 Fed.Reg. 15624 (1986), *citing, State of Alaska v. Andrus*, 580 F.2d at 473.

In adopting the principles set forth in *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1985), CEQ has said that agencies retain the duty to describe the consequences of a remote but potentially severe impact. 50 Fed. Reg. 32237 (1985). "The probable remoteness of an impact does not excuse an agency from an evaluation of those impacts when there is a body of data with which an evaluation can be made which is not unreasonably speculative." *Id., citing, Sigler* at 974.[28]

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[28] CEQ requires that agencies recognize that "one of the functions of a NEPA statement is to indicate the extent to which environmental

In both of the cases under review here, the court of appeals identified information gaps which might trigger CEQ's regulations for addressing uncertainty.[29] In the *Marsh* case, the Oregon Department of Fish and Wildlife found that uncertainty existed concerning the turbidity level of the water releases the Elk Creek would contribute to the total flow of the Rogue River. *Elk Creek SEIS*, Letter 6, from ODFW dated March 27, 1980, p. 2. In addition, the Elk Creek's contribution to the total flow of the Rogue River remained uncertain. *Id.* at p. 1. The ODFW concluded that these uncertainties could have significant effects on Rogue River salmon production and requested that further research be performed. *Id.* at p. 2. In light of this information, the court of appeals ordered the Corps either to perform the research necessary to resolve the data gaps or to prepare a "worst case analysis." *Marsh*, at 1497.[30]

Similarly, in *Methow Valley*, the order of the court of appeals required the Forest Service to provide information to fill identified data gaps. Only if the information was not available would the

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effects are essentially unknown." 50 Fed. Reg. 32236 (1985), *citing Scientists' Institute for Public Information*, 481 F.2d at 1092. Agencies must examine the risks and potential consequences of proceeding with an agency's proposal in the face of scientific uncertainty as part of their NEPA mandate. 50 Fed. Reg. 32237 (1986), *citing Calvert Cliffs' Coordinating Committee*, 449 F.2d at 1114.

[29] The plain language of CEQ's new uncertainty regulations shows that the old "worst case" process applied to both the Early Winters and Elk Creek EISs. CEQ specifically decided that the new regulation would apply only to those EISs in progress or initiated after May 27, 1986. 40 C.F.R. § 1502.22(c) (1987). The SEIS in the *Marsh* case was completed in 1980, and the EIS in *Methow Valley* was completed in 1984. Thus, at the time the respective federal agencies prepared these documents they knew that they were bound by the "worst case analysis" regulation.

[30] Regardless of the label placed on the analysis or research, the information to be provided by the Corps is essential to Oregon's ability to plan for the effects of the Elk Creek dam on its salmon fishery. The Army Corps must take a "hard look" at the potential, if uncertain, consequences of the Elk Creek dam on Oregon's salmon fishery.

Forest Service be required to perform a "worst case analysis." *Methow Valley*, at 817. In fact, CEQ's "worst case" requirement has not yet been triggered[31] because the Forest Service is in the process of performing the necessary research on the Methow mule deer herd to be included in a revised EIS that will meet the "hard look" requirements of NEPA. *Methow Valley*, at 817.[32]

Many federal actions involve uncertain consequences that must be disclosed to state and local planning agencies. Federal actions determine the transportation of hazardous materials through metropolitan areas, the discharges of pollutants into state waters and air, and the spraying of insecticides and herbicides on public lands. State and local agencies are the first to respond when unexpected consequences occur. State legislatures must have sufficient information to provide leadership on behalf of their citizens. The preparation of an EIS not only provides a structure for state participation in the federal environmental review process, but functions as a full disclosure requirement and planning tool for states that must be prepared to cope with the ultimate consequences of federal activities.

Regardless of the label attached to the process used to deal with uncertainty, under CEQ's regulations, federal agencies must disclose and analyze such uncertainty. It is imperative to the states that NEPA's and CEQ's requirements be strictly enforced and that federal agencies be required to take a "hard look" at the consequences of their actions *before* deciding to proceed.

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[31] Both of these cases present a basic ripeness problem because the court of appeals did not order that "worst case analyses" be prepared. Rather, the court only ordered that information gaps be filled, and only if the information was unavailable would the "worst case" requirement be triggered. Thus, even under the terms of the court of appeals' orders, "worst case analyses" may never be required.

[32] The information is important to the State of Washington which must plan for the potential consequences of losing a large percentage of the deer herd as a result of the construction of the major destination ski resort. The potential loss of state fish and game resources are of vital import to the states and must receive the "hard look" NEPA demands.

CONCLUSION

For all of the foregoing reasons, the twenty-eight states appearing as amici curiae herein respectfully request that the decision of the Court of Appeals for the Ninth Circuit be affirmed.

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BRIEF

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In The

Supreme Court of the United States

October Term, 1988

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY, *et al.*,
Petitioners,

v.

OREGON NATURAL RESOURCES COUNCIL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ISSUES PRESENTED

1. Whether the National Environmental Policy Act requires an environmental impact statement to include a discussion of means to mitigate the adverse impacts of a proposed action and of the likely effectiveness of such mitigation measures?

2. Whether the National Environmental Policy Act requires an environmental impact statement to include an analysis of the worst potential adverse impacts of a proposed action even where the actual occurrence of such impacts is subject to uncertainty?

3. Whether the National Environmental Policy Act requires publication of a supplemental environmental impact statement to address significant new information developed after release of the original impact statement and relevant to the environmental concerns addressed by the statement?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici Curiae are non-profit public interest membership organizations[2] whose purposes include monitoring the activities of federal agencies that may affect significantly the quality of the environment. For nearly two decades, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, relevant portions of which are reproduced in Appendix B, has enabled amici and their members to review the environmental effects of agency proposals in an informed and meaningful manner. The radical interpretation of NEPA that petitioners (hereinafter the "Corps") urge on this Court would severely limit the duty of agencies to disclose fully the environmental consequences of proposed actions and, accordingly, would impair substantially the ability of amici to monitor federal actions and their effects.

SUMMARY OF ARGUMENT

NEPA has two fundamental procedural aims: (1) to provide federal decisionmakers with a complete, thorough and detailed analysis of the potentially significant environmental consequences of a proposed action; and (2) to disclose to the public that these environmental factors have informed the decisionmaking process. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1978). Through these twin procedural

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[1] All parties have consented in writing to the participation of these amici pursuant to Rule 36, Revised Rules of the Supreme Court. This brief is filed in support of the position of Respondent, Oregon Natural Resources Council, Inc. et al. in No. 87-1704 and addresses the duties of the Army Corps of Engineers under the National Environmental Policy Act.

[2] Appendix A hereto provides additional information regarding the individual amicus organizations.

aims, NEPA seeks to achieve its underlying substantive policy of protecting the natural environment from the adverse consequences of man's activities. 42 U.S.C. § 4331; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 548 (1978).

In this case, as the Ninth Circuit Court of Appeals properly found, NEPA's basic procedural aims were not met. The Corps did not develop and then assess in the *Elk Creek Supplemental Statement*[3] the effectiveness of measures proposed to mitigate the project's significant environmental impacts, did not disclose or discuss the project's potential worst case impacts, and did not supplement the environmental statement in light of relevant and significant new information about the project's likely effects. After a review of the language and history of NEPA and this Court's interpretations of the Act, this brief will address each of these defects.

ARGUMENT

I.

THE NEPA MANDATE: FULL DISCLOSURE OF ENVIRONMENTAL CONSEQUENCES TO FOSTER INFORMED DECISIONMAKING AND PUBLIC REVIEW OF PROPOSED AGENCY ACTIONS

The National Environmental Policy Act, enacted in 1969, is the nation's basic charter for protection of the environment.[4] Its still timely "national policy of environ-

[3] For convenience, amici will use the abbreviated titles of major documents in this case that the Corps adopts in its opening brief.

[4] In enacting the statute, Congress recognized that "our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not ade-

(Continued on following page)

mental protection" properly "place[s] responsibility upon the Federal Government to further specific environmental goals by 'all practicable means, consistent with other essential considerations of national policy.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (quoting 42 U.S.C. § 4331(b)). Congress recognized, however, that the Act's "desired goals could be incorporated into the everyday functioning of the Federal Government only with great difficulty." *Andrus v. Sierra Club*, 442 U.S. 347, 349-50 (1979). Accordingly, Congress incorporated "action-forcing" requirements into Section 102 of NEPA to insure realization of the Act's substantive policy. *See* S. Rep. No. 296, *supra* note 4, at 19.

In construing these "action-forcing" requirements, this Court has emphasized repeatedly the Act's goal of "insuring a fully informed and well-considered decision." *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983); *Baltimore Gas & Electric*, 462 U.S. at 97-98. The Court has stressed the importance of thorough consideration and analysis of environmental impacts. An agency must examine "*every* significant aspect of the environmental impact of a proposed action," *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 553 (emphasis added), and "must allow *all* significant environmental risks to be factored into the decision whether to undertake a proposed action," *Baltimore Gas & Electric*, 462 U.S. at 100 (emphasis added). Early on the Court also recognized the need for

(Continued from previous page)

quate to deal with the growing environmental problems and crises the Nation faces." S. Rep. No. 296, 91st Cong., 1st Sess. 4 (1969). Congress also acknowledged that our environmental problems were largely the unintended and unforeseen consequences of technological advances. *Id.* at 8-9.

a full and accurate description of the proposed action. *Aberdeen & Rockfish Railroad v. SCRAP*, 422 U.S. 289, 322 (1975), as well as the essentially "predictive" and necessarily "inexact[ ]" nature of the analysis that Section 102 of NEPA requires, *Kleppe*, 427 U.S. at 402, n.14.

Like this Court, the Council on Environmental Quality ("CEQ"), the agency charged with implementing NEPA, 42 U.S.C. § 4372(d), has emphasized consistently the importance of the statute as a vehicle for improved decisionmaking and, in turn, environmental protection. *See, e.g.*, 40 C.F.R. Part 1500 & 1500.1(c). The agency long has recognized that compliance with the Act's goals would require agencies to gather and develop new information. *See, e.g., id.* § 1502.22(a).

Of equal importance to NEPA's role in the decisionmaking process is its role as a mechanism for public disclosure of environmental effects. *See* 42 U.S.C. § 4332(c). This Court has acknowledged the need for full public disclosure, *see Kleppe*, 427 U.S. at 410, n.21; *Andrus*, 442 U.S. at 350, while the CEQ has created specific procedures to permit meaningful public review and participation in agency decisions affecting the environment, *see, e.g.*, 40 C.F.R. §§ 1501.7, 1506.6; *see also, id.* § 1500.1(b).

In sum, NEPA's "clear language," *Andrus*, 442 U.S. at 356, the opinions of this Court, and the interpretations of the CEQ uniformly establish the Act's "twin aims," *Baltimore Gas & Electric*, 462 U.S. at 97: to ensure that federal decisionmakers identify all of the potentially significant environmental impacts of a proposed action, *id.* at 100, and to provide "an environmental full disclosure law," *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973),

that will permit agency officials and members of the public to review the environmental implications of a federal project and participate in the decision-making process.

II.

THE CORPS OF ENGINEERS FAILED TO MEET NEPA'S BASIC MANDATE

The basic purposes of NEPA are not advanced by casual, inexact, and incomplete compliance with the Act's procedural requirements. *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). Yet in this case the Corps urges the Court to approve the most cursory discussion of issues at the heart of NEPA's goal of protecting the environment: the identification, development and analysis of measures to avoid or mitigate the adverse environmental consequences of government projects. Similarly, the Corps urges the Court to allow unknown and unintended consequences of man's activities, the very factors that motivated Congress to enact NEPA, S. Rep. No. 296, *supra* note 4, at 8-9, to go unaddressed in the environmental statements prepared to reveal these impacts. Finally, the Corps asks this Court to establish a rule that would invite agencies to terminate their attention to NEPA objectives upon publication of a final environmental impact statement ("EIS"), without regard to subsequent new information that significantly alters the agency's environmental conclusions. As explained below, the Court should reject the Corps' arguments in each instance and affirm the decision of the Ninth Circuit.

A. NEPA Requires Federal Agencies to Develop, Analyze and Disclose Measures to Mitigate the Adverse Impacts of a Project.

Only twelve lines of the *Elk Creek Supplemental Statement* address measures to mitigate the project's admittedly

significant impacts on wildlife. *See Elk Creek Supplemental Statement* at 6, 38 & 46. Even those few lines do not analyze the measures available; they simply list generic mitigation techniques. *Id.* at 6. Courts, however, have long recognized that informed decisionmaking and full public disclosure of environmental consequences require complete development and thorough analysis of measures to mitigate the adverse consequences of federal projects. *See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n.*, 449 F.2d 1109, 1128 (D.C. Cir. 1971). This requirement stems from the straightforward proposition that neither decisionmakers nor the public can comprehend a project's environmental consequences without disclosure and analysis of the means to minimize those consequences. Accordingly, the duty to develop and analyze mitigation measures permeates every aspect of NEPA's procedural mandate, from the requirement to provide a complete definition of the proposed action, to the identification of alternatives, to the requirement to disclose irretrievable commitments of resources. *See* 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. §§ 1502.14(f), 1505.2 & 1505.3. The discussion of mitigation measures required by Section 102(2)(C) of NEPA, therefore, is neither peripheral nor secondary. Nor is it merely a discretionary aspect of the "detail" required in an EIS.

The Corps, nonetheless, urges this Court to allow federal agencies to slight their NEPA duty to take a "hard look," *Kleppe*, 427 U.S. at 410 n.21, at available mitigation and its environmental benefits *and* to defer this analysis until after a major federal action has been approved for implementation. Brief for Petitioners at 19, 24-25, *Marsh, et al. v. Oregon Natural Resources Council, et al.*, No. 87-1704 [hereinafter "Solicitor's Brief at —"]. Such an outcome is contrary to the language of NEPA, ignores the CEQ regulations implementing the statute, and seeks to evade NEPA case law developed over the last twenty years. As the Ninth Circuit properly held, when the discussion of mitigation in an EIS

> merely lists measures to be used and includes neither an analysis nor an explanation of effectiveness, it is inadequate to satisfy the NEPA or Council on Environmental Quality Guidelines.

Oregon Natural Resources Council v. Marsh, 832 F.2d 1489, 1494 (9th Cir. 1987) [hereinafter "*Marsh*"].

1. A Complete Discussion of Environmental Mitigation Measures Is at the Heart of NEPA's Procedural Mandate.

NEPA requires that an EIS discuss and disclose "any adverse environmental effects *which cannot be avoided* should the proposal be implemented." 42 U.S.C. § 4332 (2)(C)(ii) (emphasis added). Implicit in this statutory language is the command to discuss and disclose those adverse consequences that *can* be avoided and the means for doing so. This crucial discussion cannot be added to an EIS as an afterthought. The original CEQ guidelines thus specified that a central goal of an EIS is to enable an agency:

> to avoid or minimize adverse effects wherever possible . . . [to] explore alternative actions that will avoid or minimize adverse impacts [of a proposed action] and [to] use all practicable means, consistent with other essential considerations of national policy . . . to avoid or minimize undesirable consequences for the environment.

38 Fed. Reg. 20550 (1973) (Section 1500.2). The guidelines also stated that an EIS must include, *inter alia*:

> [a] vigorous exploration and objective evaluation of the environmental impact of all reasonable alternative actions, particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects. . . .

Id. at 20554 (Section 1500.8(a)(4)).

Subsequent CEQ regulations make the mitigation requirements of the earlier guidelines explicit and threefold.[5] The regulations direct that the discussion of alternatives shall include "appropriate mitigation measures *not already included in* the *proposed action* or alternatives." 40 C.F.R. § 1502.14(f) (emphasis added). The agency's record of decision must state whether "all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted" and summarized where applicable for any mitigation. 40 C.F.R. § 1505.2(c). Finally, Section 1505.3 directs that "mitigation and other conditions established in the environmental impact statement . . . shall be implemented by the lead agency or other appropriate consenting agency."

The central role of mitigation in accomplishing NEPA's purpose of protecting and enhancing the environ-

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[5] The CEQ guidelines of 1973 did not define mitigation. The term was used only once, in Section 1500.8(a)(5) which directed agencies to include in an EIS a clear statement of how avoidable impacts would be mitigated. 38 Fed. Reg. at 20554 (1973). Otherwise, the guidelines refer to "minimizing", "avoiding" or "compensating for" environmental effects. 38 Fed. Reg. 20550, 20553-54 (1973) (Sections 1500.1, 1500.2, 1500.8). When the guidelines were revised and regulations issued in 1978, mitigation was defined, as it has been in every iteration of the CEQ regulations since then, as "avoiding", "minimizing" "rectifying", "reducing or eliminating" or "compensating for" the impacts of proposed action. 40 C.F.R. § 1508.20; 43 Fed. Reg. 56005 (November 29, 1978). This definition makes clear CEQ's intent to bring forward from the guidelines to the regulations its interpretation of NEPA to require agencies to address mitigation early and completely.

ment also has been enforced consistently by the federal courts as a fundamental aspect of NEPA's procedural mandate:

> NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual. *Clearly, it is pointless to "consider" environmental costs without also seriously considering action to avoid them.* Such a full exercise of substantive discretion is required at every important, appropriate and non-duplicative stage of an agency's proceedings.

Calvert Cliffs' Coordinating Comm., 449 F.2d at 1128 (emphasis added and in original). Similarly, the Eighth Circuit has held that: "The proposed mitigation plans go to the very heart of the question before the Corps in preparing its environmental impact statement—whether the project should proceed at the present time in view of its environmental consequences." *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972). Finally, in *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688 (9th Cir. 1986), *rev'd in part on other grounds sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, — U.S. —, 108 S.Ct. 1319 (1988), the Ninth Circuit held that: "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Id.* at 697.[6]

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[6] Other courts have similarly emphasized the importance of identifying, developing and assessing mitigation measures as a part of meeting the basic NEPA requirements. *See, e.g., Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1340-41 (S.D. Tex. 1973), *rev'd on other grounds sub. nom. Sierra Club v. Callaway*, 499

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2. The Corps of Engineers Failed to Meet NEPA's Procedural Requirement to Fully Develop and Analyze Mitigation Measures.

In order to avoid acknowledging the importance to NEPA of a complete and thorough discussion of mitigation measures, the Corps attacks the Ninth Circuit's decision in this case from a false premise: that the appellate court required a full and complete discussion of mitigation measures because it concluded that NEPA requires actual mitigation for all of a project's adverse impacts. Solicitor's Brief at 18.[7] This false premise allows the Corps to ignore the Ninth Circuit's very straightforward holding in this case: that the *Elk Creek Supplemental Statement* was defective because it lacked a sufficiently complete discussion of mitigation measures to allow reasoned decision-making in light of both the potential adverse environmental consequences of the project and the available avenues for avoiding such consequences. *Marsh*, 832 F.2d at 1493-94.

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F.2d 982 (5th Cir. 1974) (courts "should not hesitate to require further agency consideration when a project appears to call for mitigation and yet none was considered, or only a half-hearted effort was made"); *Prince George's County v. Holloway*, 404 F. Supp. 1181, 1187 (D.D.C. 1975) (mitigation to alleviate housing shortage caused by military base relocation should have been included in the EIS); *Duck River Preservation Ass'n v. Tennessee Valley Auth.*, 410 F. Supp. 758, 766 (E.D. Tenn. 1974) (EIS should have provided additional information on wildlife management area as mitigation for impacts of dam and reservoir).

[7] The Corps acknowledges that this premise is not a part of the Ninth Circuit's holding: "The court of appeals' *suggestion* that NEPA imposes a substantive duty to mitigate adverse environmental effects is [] incorrect." Solicitor's Brief at 17 (emphasis added). Moreover, contrary to the Corps' conclusion, NEPA not only suggests, its stated policy is, that federal agencies

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The Ninth Circuit's holding on this point is solidly in line with the requirements of NEPA, the CEQ regulations and judicial interpretations of both the statute and the regulations. It is axiomatic that an environmental statement must give decisionmakers "sufficient data from which to draw their own conclusions about [environmental impacts]," *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 782 (9th Cir. 1980); *see also Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 204 (8th Cir. 1986); *Sierra Club v. Corps of Engineers*, 701 F.2d 1011, 1029-30 (2d Cir. 1983); *Isle of Hope v. Corps of Engineers*, 646 F.2d 215, 220 (5th Cir. 1981); *Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1375 (10th Cir. 1980). Yet even the Corps concedes, as it must, that its twelve-line list of generic mitigation techniques does not do this. *Elk Creek Supplemental Statement* at 132 ("Since an approved mitigation plan for wildlife has not been completed, an accurate delineation of wildlife impacts cannot be portrayed"); *id.* at 58 ("an accurate determination of mitigation costs cannot be calculated without the development of [a mitigation] plan"). A twelve-line list of theoretically relevant mitigation measures discloses nothing about the costs of the identified measures or their feasibility, past success or likely success in this case.[8] Under these circumstances, the Ninth Cir-

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should take substantive measures to mitigate the adverse effects of their projects on the environment. 42 U.S.C. § 4332(2)(c)(ii); *see also* 40 C.F.R. § 1505.2(c) (agency decisionmakers must explain why available mitigation measures have not been adopted).

[8] The failure to discuss and analyze adequately mitigation measures has led the public and decisionmakers to accept even

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cuit correctly concluded that the Corps had not meaningfully considered mitigation measures as required by NEPA and CEQ regulations, 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. §§ 1502.14, 1502.16, and had not explained the basis for a decision not to adopt such measures. 40 C.F.R. § 1505.2(e). In fact, the Corps in this case treated its fundamental NEPA duty to identify, develop and analyze measures to avoid adverse project impacts as a mere *pro forma* ritual. *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1128. The Ninth Circuit properly refused to approve such action.[9]

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highly controversial projects on the basis of vague measures proposed to obviate or mitigate their severe impacts. Such reliance is misplaced, however, when the proffered mitigation is little more than a "wish list," with little likelihood of implementation. Unfortunately, there are numerous impact statements—representative examples of which are described in Appendix D—in which agencies have promised unanalyzed mitigation that they failed to deliver. In such circumstances, the public is misled and left without a remedy in the courts. *See City of Blue Ash v. McLucas*, 596 F.2d 709 (6th Cir. 1979); *Ogunquit Village Corp. v. Davis*, 553 F.2d 243 (1st Cir. 1977).

The Ninth Circuit's requirement that agencies analyze and examine in an EIS the effectiveness of mitigation measures will prevent unjustified reliance by decisionmakers, as well as the public, on measures which agencies are unlikely to implement. Had this requirement been in place when the EISs discussed in Appendix D were prepared, better mitigation measures would have been designed or different alternatives chosen, and the environmental damage which resulted would have been avoided.

[9] The failure to discuss and analyze mitigation measures is more than a technical shortcoming. As numerous comments on the Corps' EIS indicate, the failure to assess the feasibility and effectiveness of the listed mitigation measures precluded informed understanding of the project's likely impacts. *See, e.g., Elk Creek Supplemental Statement* at 69 (comments of Oregon Department of Fish and Wildlife noting that "[i]t isn't known yet if there is enough suitable land within the project to provide adequate [wildlife] compensation"); *id.* at 85-86 (in-

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3. Petitioners Offer No Valid Excuse For Their Failure To Fully And Completely Discuss Mitigation Measures.

Petitioners defend their "half-hearted effort" to discuss mitigation measures, *Sierra Club v. Froehlke*, 359 F. Supp. at 1341, with the novel argument that a less thorough analysis and discussion of measures to avoid potential environmental impacts than NEPA would otherwise require is appropriate where the particular impacts to be mitigated, although *significant*, are either a small component of the overall significance of the project's environmental effects, or are of uncertain scope and magnitude, Solicitor's Brief at 24-25.

While NEPA does not "elevate environmental concerns over other appropriate considerations," *Baltimore Gas & Electric*, 462 U.S. at 97, it also does not allow an agency to elevate consideration and discussion of some significant environmental concerns while ignoring others. Thus, as this Court has stated, "NEPA places upon an agency the obligation to consider *every* significant aspect of the environmental impact of a proposed action," *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 553 (emphasis added), and requires agencies to "allow *all* significant environmental risks to be factored into the de-

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dividual comment that "wildlife mitigation projects have not been successful in increasing the carrying capacity for species other than big game"); *id.* at 142 (comments of Boise Cascade Corp. that "there is no assessment of the impact [of mitigation measures]. Timber growing potentials will have to be exchanged for enhanced cover and food and this should be included as a cost."). Moreover, as noted in example 6 of Appendix D, the requirement to analyze the effectiveness of mitigation measures is not onerous. Other agencies have undertaken such a discussion in some of their environmental statements, to the benefit of the public and the decisionmakers.

cision whether to undertake a proposed action," *Baltimore Gas & Electric*, 462 U.S. at 100 (emphasis added). Moreover, NEPA requires a full and accurate description of the proposed action. *Aberdeen & Rockfish Railroad*, 422 U.S. at 322.

In short, agencies cannot take a selective "hard look" at significant environmental consequences. Rather, NEPA requires a "hard look" at and a reasoned discussion of *all* of the environmentally significant impacts of an agency proposal, including measures to mitigate those impacts, so that decisionmakers and the public can understand and evaluate the proposal. *See, e.g., Druid Hills Civic Ass'n v. Federal Hwy. Admin.*, 772 F.2d 700, 718 (11th Cir. 1985); *Sierra Club v. Corps of Engineers*, 701 F.2d at 1029-30; *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982); *Minnesota PIRG v. Butz*, 541 F.2d 1292, 1300 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); *Environmental Defense Fund v. Froehlke*, 473 F.2d at 348-51; *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971). The simple fact is that the Corps failed to provide this reasoned discussion of mitigation measures in the *Elk Creek Supplemental Statement*. *See Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982).

The Corps also defends the abbreviated discussion of mitigation options in the *Elk Creek Supplemental Statement* with the assurance that more analysis of mitigation will be done later. Solicitor's Brief at 26. However, future discussion of mitigation measures will occur outside the NEPA process. More importantly, a deferred discussion of mitigation necessarily will occur *after* the decision to go forward with the Elk Creek project has been made.

Development of a mitigation plan for a project at some unspecified future date through an unspecified

administrative procedure is no substitute for providing a reasoned discussion of mitigation measures in an EIS. To sanction such a course of action would prevent public review of an agency's actual proposal for action and would provide agency decisionmakers with only a partial picture of the project. As the First Circuit observed in response to an agency argument like the one made by the Corps here:

> [T]he requirement of a detailed statement is not a pointless technicality even when the agency has in fact considered environmental factors in good faith; intra-agency consideration lacks the benefits secured by discussion in the EIS. NEPA seeks to achieve substantive environmental improvement by requiring full disclosure of the basis for agency action. . . . [To allow compliance with NEPA's procedural requirement through other agency processes] would place the burden of combing the administrative record, which is often scattered through the files of numerous federal and state agencies, on interested members of the public. NEPA expressly places the burden of compiling information on the agency so that the public and interested government departments can conveniently monitor and criticize the agency's action.

Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1073 (1st Cir. 1973).

Similarly, a vague promise that an agency will discuss mitigation measures later does not excuse its failure to consider fully environmental values early in a project's development. *See* 40 C.F.R. § 1502.2(g) (EISs "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justify decisions already made."). This Court has long recognized that both NEPA and the CEQ regulations implementing the statute require *early*, as well as full, compliance with

NEPA's procedures in order to ensure complete consideration of environmental consequences *before* an agency makes its decision to adopt a particular course of action:

> The thrust of [NEPA] § 102(2)(C) is thus that environmental concerns be integrated into the very process of agency decisionmaking. . . . 'In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning. . . . As a result, unless the results of planning are radically revised at the policy level . . . environmental enhancement opportunities may be foregone and unnecessary degradation incurred.' . . . For this reason, the regulations of the Council on Environmental Quality (CEQ) require federal agencies to 'integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values . . . .'

Andrus, 442 U.S. at 351 (citations omitted). The lower federal courts also have recognized the importance of early and complete compliance with NEPA's mandate to consider environmental values. *See, e.g., Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983); *California v. Block*, 690 F.2d at 761-63; *Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979); *see also* 40 C.F.R. §§ 1501.2, 1502.5. The need for early compliance with NEPA's procedural mandate does not extend simply to preparation of an EIS, but to every important aspect of such a statement. Thus an agency may not choose to assess consequences now and develop alternatives later. *Port of Astoria*, 595 F.2d at 478; *Foundation for North American Wild Sheep v. Department of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982). Likewise, an agency may not defer complete evaluation of available mitigation measures until after it has made a decision to proceed with a project. *Port of Astoria*, 595 F.2d at 478.

NEPA's procedural mandate does not allow an agency to avoid or defer a complete analysis of mitigation measures any more than it allows an agency to avoid or defer development of a full range of alternatives or a discussion of every significant aspect of a project's environmental impacts. Accordingly, the Ninth Circuit properly ruled that the *Elk Creek Supplemental Statement* was defective. Instead of a reasoned discussion of mitigation measures, the statement contains a mere generic list of mitigation techniques. Such a list provides neither the decisionmaker nor the public with a complete and accurate description of the agency's proposed action. *Aberdeen & Rockfish Railroad*, 422 U.S. at 322.

B. NEPA Requires Federal Agencies to Disclose and Discuss the "Worst Case" Impacts of a Project.

NEPA's twin aims of informed decisionmaking and full public disclosure can be met only if each EIS confronts and analyzes all of the potentially significant effects of a project. The Corps, however, challenges both the Ninth Circuit's conclusion that analysis of potentially significant worst case impacts for the Elk Creek dam may be required, Solicitor's Brief at 34-35, and the court's delineation of the elements of that analysis, *id.* at 31-34. Of course, the Corps does not acknowledge that the revised CEQ regulation it would have this Court apply is, by its terms, inapplicable. The revised regulation applies only to EISs "for which a Notice of Intent [] is published in the Federal Register on or after May 27, 1986." 40 C.F.R. § 1502.22(c). The Corps released the *Elk Creek Supplemental Statement* in December, 1980—over five years before the revised regulation became effective. Accordingly, this Court need not consider any of the Corps' arguments that rely on application of the revised regulation.

Even if the Court does consider the Corps' arguments, both the original and revised regulations require an assessment of potential worst case impacts under the same circumstances. Moreover, the Corps is wrong in arguing that the facts of this case do not necessitate, under either regulation, an assessment of worst case impacts. Finally, while the Corps correctly points out that there is a substantive difference between the scope of analysis that the original and revised CEQ regulations require, the Ninth Circuit properly concluded that only the broad inquiry into environmental consequences that the original rule requires is consistent with NEPA's mandate.

1. NEPA Requires Analysis Of Significant But Uncertain Impacts.

Courts have long recognized that a discussion of the full range of a project's potentially significant consequences requires "[r]easonable forecasting and speculation." *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). To satisfy NEPA, therefore, an EIS must identify "which environmental effects are essentially unknown," *id.*, consider "the probabilities as well as the consequences" of such effects, *Carolina Environmental Study Group, Inc. v. United States*, 510 F.2d 796, 799 (D.C. Cir. 1975), and evaluate "the cost of uncertainty—i.e., the costs of proceeding without more and better information." *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir.), *vacated on other grounds sub nom. Western Oil & Gas Ass'n v. Alaska*, 427 U.S. 922 (1978).

The CEQ also has recognized the need to address potentially significant but uncertain project consequences when information about such consequences is unavailable.

In 1978, CEQ adopted a "worst case analysis" regulation to ensure that federal agencies would consider the full range of a project's environmental consequences. 40 C.F.R. § 1502.22 (1985) (superseded) (reprinted in Appendix C).[10] Although this regulation has been amended, the revised regulation's purpose and the importance of this purpose to full compliance with NEPA's mandate has not changed. Indeed, when the CEQ adopted final amendments to the worst case regulation it observed:

> It must again be emphasized that the Council concurs in the underlying goals of the original regulation—that is, disclosure of the fact of incomplete or unavailable information; acquisition of that information if reasonably possible; and evaluation of reasonably foreseeable significant adverse impacts even in the absence of all information. These goals are based on sound public policy and early NEPA caselaw.

Purpose and Analysis of Final Amendment, 51 Fed. Reg. 15620 (1986) (footnote omitted); *see also* 49 Fed. Reg. 50744 (1984).

2. Both The Original And Revised CEQ Regulations Require Analysis Of Significant But Uncertain Impacts Under The Same Circumstances.

Both the original worst case analysis regulation and the new rule specify the circumstances under which NEPA

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[10] The CEQ addressed the relationship of its 1978 regulation to NEPA's full disclosure policy in later guidance:

> NEPA requires that impact statements, at a minimum, contain information to alert the public and Congress to all known *possible* environmental consequences of agency action. Thus, one of the federal government's most important obligations is to present to the fullest extent possible the spectrum of consequences that may result from agency decisions and the details of their potential consequences for the human environment.

"Forty Most Asked Questions Concerning CEQ's NEPA Regulations," 46 Fed. Reg. 18026, 18032 (1981) (withdrawn) (emphasis in original) [hereinafter "Forty Most Asked Questions"].

requires analysis of low probability but potentially catastrophic environmental impacts. *See* 40 C.F.R. § 1502.22 (1985) (superseded) (reprinted in Appendix C); 40 C.F.R. § 1502.22 (reprinted in Appendix C). According to the CEQ, the revised regulation makes no substantive change to these provisions of the original regulation. 51 Fed. Reg. 15621 (1986) ("[the revised regulation] retains the legal requirements of the first paragraph and subsection (a) of the original regulation"). Thus, under both regulations, the same circumstances trigger analysis of significant but uncertain impacts.[11] Even if the new rule applies, the Ninth Circuit's reliance on the original regulation to determine whether such an analysis should have been included in the EIS for the Elk Creek dam is of no legal significance.[12]

3. The Ninth Circuit Properly Concluded That An Analysis Of Significant But Uncertain Impacts Could Be Required For The Elk Creek Project.

The Ninth Circuit found that circumstances requiring analysis of significant but uncertain impacts could be pre-

[11] The "trigger" language of both regulations actually appears as the first phrase of subsection (b) and in each case is stated as the inability to meet the requirements of subsection (a). Case law interpreting the triggering requirements of the original regulation as well as the language and CEQ response to comments on the revised regulation make it clear that the threshold requirements of the two regulations are the same. *Compare Sierra Club v. Sigler*, 695 F.2d 957, 974 (5th Cir. 1983) (interpreting triggering requirements of original regulation); *Save Our Ecosystem v. Clark*, 747 F.2d 1240, 1244 & n.5 (9th Cir. 1984) (same), *with* 40 C.F.R. § 1502.22(b) (definition of "reasonably foreseeable"); 51 Fed. Reg. 15623 (1986) (comments and response regarding triggering circumstances).

[12] The Corps acknowledges as much in its brief when it concludes, albeit wrongly with respect to the merits, that "neither the old nor the new CEQ regulation concerning incomplete information is applicable to [the *Marsh* facts]." Solicitor's Brief at 35.

sented to the Corps when the agency reconsiders its project on remand. *Marsh*, 832 F.2d at 1497. The appellate court's guidance to the Corps regarding the circumstances that could trigger such an analysis is entirely proper. Indeed, the Corps does not challenge this guidance; instead, it asserts that the court of appeals improperly found sufficient evidence in the record to require either additional study or a worst case analysis. Solicitor's Brief at 34-35. On this point, the Corps is wrong: the record does reveal sufficient evidence of uncertainty and missing information about the potential impacts of the Elk Creek dam on turbidity in the Rogue River,[13] an admittedly essential environmental concern, *Elk Creek Supplemental Statement* at 37, 70, to require either further study or a worst case analysis.

4. Only The Broad Inquiry Into Environmental Consequences Required By The Original Worst Case Regulation Is Consistent With NEPA's Mandate.

On remand, if the Corps cannot obtain information about the project's impacts on turbidity, the Ninth Circuit's decision requires the Corps to analyze the likely nature and extent of these impacts pursuant to the procedures of the original worst case regulation. *Marsh*, 832 F.2d at 1497. The Corps argues that this ruling is incor-

[13] The Ninth Circuit properly noted uncertainty and a lack of clear information about these key impacts. *Marsh*, 832 F.2d at 1497. Extensive comments on uncertainty in the EIS support the court's conclusion, *see Elk Creek Supplemental Statement* at 68, 135, as does the Corps' concurrence with these comments, *see id.* at 70, 138, even though the agency steadfastly has refused to acknowledge the effects of uncertainty on the forecasting of critical impacts, *id.* at 33-34, 37. The court properly concluded that the uncertainty and information gaps on these points could not simply be disclosed and dismissed as a comment on the project. *Marsh*, 832 F.2d at 1497 (citing *Save Our Ecosystems v. Clark*, 747 F.2d at 1244 n.5).

rect in light of the CEQ's revision of the worst case analysis rule. While the scope of analysis required by the original regulation is broader than the scope of analysis required by the revised regulation, *compare* 40 C.F.R. § 1502.22(b) (1985) (superseded) *with* 40 C.F.R. § 1502.22(b); *see also* 51 Fed. Reg. 15623 (1986), only the original regulation compels the broad inquiry into potentially significant environmental consequences mandated by NEPA. The revised regulation impermissibly seeks to narrow the scope of this inquiry.[14]

Once triggered, the original worst case regulation required an agency to prepare a "worst case analysis" and to indicate its probability of occurrence.[15] Under CEQ's revised regulation, when an agency determines that relevant information is unobtainable, it must evaluate only those reasonably foreseeable significant adverse impacts

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[14] This Court has stated that "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus*, 442 U.S. at 358. However, the Court also has ruled that the construction of a statute by those charged with its execution should not be followed if " 'there are compelling indications that it is wrong.' " *Federal Communications Comm'n v. WNCN Listeners Guild*, 450 U.S. 582, 598 (1981) (quoting *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 381 (1969)). Accordingly, "CEQ's interpretation of [NEPA] is binding . . . on agencies preparing EIS's unless it is shown that the interpretation conflicts with the language or legislative intent of NEPA or the teachings of the Supreme Court." *Sierra Club v. Sigler*, 695 F.2d at 972.

[15] The original worst case regulation required agencies to address in their analysis the reasonably foreseeable consequences of a project. "The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action." Forty Most Asked Questions, 46 Fed. Reg. at 18032; *see also Northwest Coalition for Alternatives to Pesticides v. Lyng*, 894 F.2d 588, 597-98 (9th Cir. 1988); *Village of False Pass v. Clark*, 743 F.2d 605, 616 (9th Cir. 1984); *Save Our Ecosystems v. Clark*, 747 F.2d at 1244-45; *Sierra Club v. Sigler*, 695 F.2d at 974-75.

that are supported by "credible scientific evidence."[16] 40 C.F.R. § 1502.22(b). The CEQ added the "credible scientific evidence" standard to the revised regulation to limit the scope of inquiry in situations of uncertainty. 51 Fed. Reg. 15623 (1986). Both the CEQ's motive and the limits the new rule imposes are foreign to the language and purpose of NEPA. The statute's command for fully-informed decisionmaking and public disclosure simply does not permit agencies to ignore reasonable evidence of significant impacts whether such evidence is based on historical fact, common sense, experience, logic or "credible scientific evidence." *See, e.g., Sierra Club v. Corps of Engineers*, 701 F.2d at 1029-30; *Silva v. Lynn*, 482 F.2d at 1285. *See also Northwest Coalition for Alternatives to Pesticides*, 844 F.2d at 597-98.[17] The "credible scientific evidence" limitation of the revised regulation, therefore, unduly restricts NEPA's requirement that agencies assess all of a project's potentially significant impacts. *Calvert Cliffs' Coordinating Comm.*, 499 F.2d at 1122. The Ninth Circuit

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[16] The new regulation further specifies that the analysis must not be based on pure conjecture and must be within the rule of reason. Despite CEQ's assertions to the contrary, *see* 50 Fed. Reg. 32236-37 (1985); 51 Fed. Reg. 15620-21 (1986), these provisions impose no new limitations on analyses under Section 1502.22(b), *see, e.g., Sierra Club v. Sigler*, 695 F.2d 974-75 & n.14 (requiring worst case analyses to be based on existing data, and to be informative, useful and not unreasonably speculative).

[17] Significant environmental effects include "ecological, aesthetic, historic, cultural, economic, social, or health [effects], whether direct, indirect or cumulative." 40 C.F.R. § 1508.8(b). An impact may be significant because, *inter alia*, it is controversial, it affects public health and safety, or it involves unique risks. 40 C.F.R. § 1508.27. Various relevant sources provide critical evidence on these factors although they may not meet a threshold of "scientific" credibility. These sources, nonetheless, define the type of environmental impact which an agency must analyze in an EIS.

correctly ruled that only the kind of analysis required by the original worst case regulation, as interpreted by the courts, meets the full disclosure standards of NEPA.

C. NEPA Requires Federal Agencies to Supplement a Previously Prepared Environmental Statement When There Is Significant New Information.

An agency cannot simply forget NEPA's twin procedural goals—environmentally informed decisionmaking and full public disclosure of environmental consequences—upon publication of a final environmental impact statement. Instead, as the CEQ regulations make clear, federal agencies must continue to collect data on environmental impacts even after release of a final statement and, if significant new information regarding these impacts comes to light, the agency must prepare and issue a supplemental statement. 40 C.F.R. § 1502.9(c)(1)(ii). Strict attention to this procedural duty is especially important if the public is to be informed fully about the environmental consequences of federal projects. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 91-92 (2d Cir. 1975).

The Corps does not dispute the propriety of the requirement to supplement an EIS. Nor does the Corps question the relevance of this requirement to the Elk Creek dam project. Instead, the Corps contends, first, that the Ninth Circuit applied an improper standard of review to its decision not to supplement the existing EIS, Solicitor's Brief at 36-38; and, second, that under this erroneous standard of review, the appellate court improperly substituted its judgment for that of the Corps in deciding a supplemental EIS should be prepared, *id.* at 38-44. The Corps is wrong on both counts.

1. Agencies Must Supplement A Final EIS When There Is Significant New Information.

In order to make the NEPA process and result meaningful, an agency must continue to gather and evaluate new information relevant to its proposal after release of a final EIS. *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1463 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985). Thus the regulations of both the CEQ and the Corps provide that an agency "[s]hall prepare" a supplemental EIS if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9 (c)(1)(ii) (CEQ regulation); *see also* 33 C.F.R. § 230.11 (b) (Corps regulation), *revised by* 53 Fed. Reg. 3120, 3130 (1988) (to be codified at 33 C.F.R. § 230.13(b)). The regulations leave no discretion to the agency. If significant new information comes to light, the agency "*shall* prepare" a supplement.

2. Courts Must Review For Reasonableness An Agency's Decision Not To Supplement An Existing EIS.

A reviewing court must scrutinize closely an agency's decision not to prepare a supplemental EIS when faced with new environmental data, because the agency has no discretion to avoid this threshold question. NEPA and its implementing regulations mandate preparation of a supplemental EIS when certain conditions are present. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.9(c)(1)(ii). Under such circumstances, this Court has stated that the appropriate standard of review is "whether on the facts the [agency's] decision can *reasonably* be said to be [within the statutory strictures]." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (emphasis

added); *see also Baltimore Gas & Electric*, 462 U.S. at 104, 105 (upholding agency action under NEPA because it was "within the bounds of reasoned decisionmaking").

Five circuit courts have addressed the standard of review for an ageney's threshold decision not to prepare a supplemental EIS and all five have ruled that such a decision must be evaluated for reasonableness. *See, e.g., Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987); *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974-75 (D.C. Cir. 1985); *Enos v. Marsh*, 769 F.2d 1363, 1373 (9th Cir. 1985); *Massachusetts v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983); *Monarch Chemical Works, Inc. v. Thone*, 604 F.2d 1083, 1087 (8th Cir. 1979).[18]

As the Fifth Circuit accurately observed in a similar context:

> The spirit of [NEPA] would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review. Every such decision pretermits all consideration of that which Congress has directed be considered "to the fullest extent possible." The primary decision to give or bypass the consideration required by the Act must be subject to inspection under a more searching standard.

Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973); *see also Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248-49 (10th Cir. 1973).[19]

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[18] Additionally, although the Tenth and Eleventh Circuits have not addressed squarely the supplemental EIS issue, these courts have held that they will review for reasonableness the threshold decision whether to prepare an initial EIS. *Park County Resource Council, Inc. v. Department of Agric.*, 817 F.2d 609, 621 (10th Cir. 1987); *Manasota 88, Inc. v. Thomas*, 799 F.2d 687, 691-92 (11th Cir. 1986).

[19] This Court's decisions in *Kleppe* and *Vermont Yankee* do not conflict with use of the reasonableness standard to review

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Applying the reasonableness standard of review here fulfills this Court's directive in *Overton Park* that threshold determinations be subjected to "a thorough, probing, in-depth review." 401 U.S. at 415. To do less would ignore NEPA's mandate that environmental considerations be taken into account "to the fullest extent possible." 42 U.S.C. § 4332.

3. The Ninth Circuit Properly Applied The Reasonableness Standard Of Review To The Corps' Decision Not To Supplement The EIS For The Elk Creek Project.

Under the reasonableness standard of review, the plaintiff has the burden of initially demonstrating that, in light of new information or circumstances, the project may significantly affect the environment in a way not pre-

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an agency's decision not to prepare a supplemental EIS. In *Kleppe*, the issue was not whether a supplement should have been prepared, but rather what were the appropriate geographic boundaries for an EIS. *Kleppe*, 427 U.S. at 395. The Court held that the determination of the region to be addressed in a comprehensive EIS was within the agency's discretion and was reversible only if arbitrary. *Id.* at 412; *see Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir.) (concluding that a court should review an agency's threshold determination whether to prepare an EIS under the "rule of reasonableness," but finding that "plaintiffs have failed to show arbitrary agency action in preparing individual impact statements for the relevant forests" (emphasis added)), cert. *denied*, 439 U.S. 966 (1978).

Nor does *Vermont Yankee* prevent use of a reasonableness standard to review an agency's decision not to prepare a supplemental EIS. The issue in *Vermont Yankee* was whether NEPA required the agency to include a particular alternative in its EIS. 435 U.S. at 549-55. The Court upheld the agency's action as not arbitrary or capricious, *id.* at 554, reasoning that an agency need not "ferret out every possible alternative, regardless of how uncommon or unknown," *id.* at 551. Thus neither *Kleppe* nor *Vermont Yankee* addresses the proper standard of review for an agency's threshold decision whether to prepare a supplemental EIS.

viously addressed in an EIS. *See Sierra Club v. Froehlke*, 816 F.2d at 210; *Monarch Chemical Works, Inc. v. Thone*, 604 F.2d at 1087-88; *Foundation for North American Wild Sheep*, 681 F.2d at 1177-78. Respondents satisfied this threshold burden. The *ODFW Study* and *SCS Report*[20] were based on, and set forth, important data not available at the time the Corps released its previous final supplemental EIS. These new data indicated that the environmental impacts of the Elk Creek dam on the survival of fish and on river turbidity were likely to be more serious than previously thought. *See* Crameyet al., *Lost Creek Dam Fisheries Evaluation Phase I Completion Report*, District Court Document No. 21, A.R. Doc. No. 92, at 75, 78-79.1, Appendices 11 and 16, & Summary and Recommendations at 4-5. This evidence was sufficient to force the Ninth Circuit to assess the reasonableness[21] of the Corps' decision not to

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20 *See supra* note 3 (identifying source of abbreviations for document titles).

21 Judicial definitions of "reasonableness" provide agencies with explicit and useful guidance to determine when to supplement an EIS.

> Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.

Warm Springs Dam Task Force v. *Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980); *see also Cuomo* v. *Nuclear Regulatory Comm'n*, 772 F.2d at 975 (adopting *Warm Springs* factors); *Environmental Defense Fund, Inc.* v. *Marsh*, 651 F.2d 983, 991-97 (5th Cir. 1981) (considering essentially the same factors). The Ninth Circuit carefully assessed and weighed these factors in applying the reasonableness standard of review in this case.

supplement was unreasonable. *Marsh*, 832 F.2d at 1495-96.[22]

The Corps argues, nonetheless, that it met any duty to supplement the Elk Creek EIS in light of the *ODFW Study* when in 1985 it issued a supplemental information report (SIR) discussing some of the new ODFW data. Solicitor's Brief at 39-42; *see also* 33 C.F.R. § 230.11(d) (Corps regulation on SIRs), *revised by* 53 Fed. Reg. 3120, 3130 (1988) (to be codified at 33 C.F.R. § 230.13(d)). Of course the SIR completely ignored the new information in the *SCS Report*. More importantly, an SIR simply cannot substitute for a supplemental EIS. *See Louisiana v. Lee*, 758 F.2d 1081, 1084 (5th Cir. 1985) ("Any decision based on an environmental assessment alone is necessarily more speculative than one made after the preparation and full consideration required by an impact statement."), *cert. denied*, 475 U.S. 1044 (1986); *Natural Resources Defense Council v. Callaway*, 524 F.2d at 91-92 (given significant environmental information, agency must circulate supplemental document and review comments before making a decision). "Congress has specified the procedural means appropriate to vindicate the substantive goals of NEPA," *Grazing Fields Farm*, 626 F.2d at 1072, and the Corps must follow these procedural means.

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22 For example, the Corps acknowledged that even its own study showed dam construction would increase river temperature, yet it dismissed the unquantified effects of this increase as likely to be "offset by" other river flow adjustments. SIR, Addendum C to Solicitor's Brief, at 10a. The Corps' analysis of increased fish mortality provided no countervailing data to that in the *ODFW Study*, but merely concluded without rationale that the evidence in the study was "not firm enough." *Id.* at 11a. In addition, although the Corps had previously used soil type data to predict river turbidity, it entirely ignored, even in its SIR, the significantly changed soil type data in the *SCS Report*.

Finally, contrary to the Corps' claim, *see* Solicitor's Brief at 44, this is not a situation where significant new and relevant information continually comes to light, thus forcing an agency continually to update its environmental documents. *See Friends of the River v. Federal Energy Regulatory Comm'n*, 720 F.2d 93, 109 (D.C. Cir. 1983) (quoting *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 554-55). The *ODFW Study* and *SCS Report* presented the Corps with specific, limited new data on issues that the agency already had acknowledged were key environmental concerns. The Corps should have welcomed the opportunity the new data provided to improve the accuracy and utility of its overall environmental assessment of the Elk Creek dam and incorporated these new data into a supplemental EIS. The Corps fell short of its NEPA-mandated responsibilities when it unreasonably failed to do so.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

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APPENDIX A

The interests of the organizational amici are as follows:

1. The Environmental Defense Fund ("EDF"), a national not-for-profit membership organization established in 1967, is dedicated to the protection and rational use of natural resources, and to the preservation and enhancement of the human environment. EDF and its staff of scientists, lawyers, economists and others pursue these goals through scientific research, monitoring, and administrative and judicial action. EDF has approximately 60,000 members nationwide, and has played an active role in the development of case law and administrative regulations relating to the National Environmental Policy Act ("NEPA").

2. Friends of the Earth ("FOE") is both a national and international environmental advocacy organization dedicated to the preservation, restoration and rational use of the ecosphere. Established in 1969, FOE has approximately 15,000 members nationally. FOE and its members regularly utilize environmental documents prepared pursuant to NEPA to further the organization's overall purpose and to monitor federal agencies' compliance with all of the nation's environmental laws, including the Act itself. In addition to participating in administrative proceedings, FOE has engaged in litigation to ensure full implementation of NEPA.

3. The Izaak Walton League of America ("IWLA") is a non-profit membership organization incorporated under the laws of the State of Illinois. The IWLA currently has approximately 45,000 members nationwide and maintains a

national office in Arlington, Virginia. The IWLA was formed, in 1922, "for scientific and educational purposes; to conserve, maintain, protect and restore the soil, forest, water and other natural resources of the United States of America; to promote means and opportunities for the education of the public with respect to such resources and the enjoyment and wholesome utilization thereof." For almost two decades, the IWLA has worked to achieve these objectives through participation in the NEPA procedures of federal agencies.

4. The National Audubon Society ("Audubon") is a non-profit membership organization incorporated under the laws of the State of New York. Since the turn of the century, Audubon has been dedicated to the conservation of wildlife and other natural resources, and to the protection of the natural environment. With over one-half million members, Audubon's principal place of business is in New York City. In order to further its purposes, Audubon has actively participated in numerous judicial and administrative actions to ensure effective implementation of NEPA.

5. The National Parks and Conservation Association ("NPCA"), is a non-profit membership organization incorporated in Washington, D.C. Founded in 1919 to serve as a defender and advocate of the National Park System, NPCA has approximately 85,000 members nationwide. To help ensure preservation of the resources of the National Park System, NPCA's staff and members routinely utilize the NEPA process to participate in federal decisionmaking involving the nation's parks.

6. The National Trust for Historic Preservation in the United States ("the National Trust") was chartered by Congress in 1949 as a private nonprofit organization, for the purpose of protecting our nation's heritage. The statutory mandate of the National Trust is to preserve America's historic resources, further the nation's historic preservation policy, and promote public involvement in historic preservation. *See* 16 U.S.C. §§ 461, 468. The National Trust has approximately 219,000 individual members nationwide, and 3,400 member organizations. The National Trust regularly reviews and comments on NEPA documents prepared on projects that may affect historic resources. In addition, the National Trust has engaged in litigation to enforce NEPA's mandates.

7. The National Wildlife Federation ("NWF") has over 5.1 million members and supporters, and is the nation's largest non-profit private conservation/education organization. Incorporated under the laws of the District of Columbia in 1939, NWF is dedicated to the wise use and management of the nation's natural resources. NWF's national office is located in the District of Columbia; it has fifty-two state and territorial affiliates. NWF and its members routinely participate in federal agency decisionmaking through reviewing and commenting on environmental documents. The organization has, in addition, participated extensively in the development of federal regulations implementing NEPA and has engaged in litigation to secure compliance with the Act's requirements.

8. The Natural Resources Defense Council, Inc. ("NRDC") is a nonprofit environmental membership organization incorporated under the laws of the State of

New York. NRDC has over 91,000 members nationwide, and is dedicated to the defense and preservation of the human environment and the natural resources of the United States. NRDC's purposes include monitoring and participating in federal agency decisionmaking to ensure that federal statutes enacted to protect the environment are fully and properly implemented. Since its inception in 1970, NRDC has been intensively involved in the efforts of federal agencies to comply with the requirements of NEPA. NRDC regularly submits written comments on the environmental documents prepared by numerous federal agencies, has participated in the development of agency procedures to implement NEPA, and has engaged in litigation to enforce the Act's provisions.

9. The Wilderness Society ("TWS") is a national non-profit citizens organization with more than 225,000 members nationwide. Headquartered in Washington, D.C., TWS is dedicated to the preservation of wilderness and to the proper management of publicly-owned lands. TWS has participated extensively in administrative and judicial actions relating to the implementation of NEPA, and regularly reviews and comments upon environmental documents prepared by federal agencies pursuant to its requirements.

APPENDIX B

STATUTES INVOLVED

42 U.S.C. § 4321. Congressional declaration of purpose [NEPA § 2]

> The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. (Jan. 1, 1970, Pub.L. 91-190, § 2, 83 Stat. 852).

42 U.S.C. § 4331. Congressional declaration of national environmental policy [NEPA § 101]

(a) Creation and maintenance of conditions under which man and nature can exist in productive harmony

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill

the social, economic, and other requirements of present and future generations of Americans.

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasant surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) Responsibility of each person to contribute to preservation and enhancement of environment

The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Jan. 1, 1970, Pub. L. 91-190, Title I, § 101, 83 Stat. 852.)

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts [NEPA § 102]

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter, and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize

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[1] So in original. The period should probably be a semicolon.

international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

APPENDIX C

CEQ REGULATIONS INVOLVED

I.

The Council on Environmental Quality's present regulation governing incomplete or unavailable information provides (40 C.F.R. 1502.22):

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific

community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

II.

The Council on Environmental Quality's rescinded regulation governing incomplete or unavailable information (the "worst case" regulation) provided (40 C.F.R. 1502.22 (1985)):

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alter-

natives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

APPENDIX D

Examples of mitigation measures which were proposed in environmental impact statements but never implemented

1. *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987): The Corps of Engineers proposed to acquire specified wetlands in California to minimize impacts of a multi-faceted project on two avian species, both listed as endangered under the Endangered Species Act of 1973 ("ESA"). The agency relied on the proposed mitigation to conclude, in its final environmental impact statement ("EIS"), that the project was not likely to violate the mandatory terms of the ESA. *See* 816 F.2d at 1379. Because the government failed to obtain the mitigation lands, *id.* at 1380, the court held that the Corps had violated the ESA, *id.* at 1386.

2. *Rio Grande Preservation Project* (Texas and Mexico): The final EIS for a Rio Grande River rechannelization project identified a number of specific mitigation measures, including construction features, to offset wildlife habitat losses and to enhance existing habitat.[1] During construction, many of these mitigation features were abandoned or altered. Following the filing of a lawsuit, a consent judgment was entered, in the U.S. District Court for the Western District of Texas, Civ. Action No. A-83-CA-271 (February 26, 1988), pursuant to which the parties agreed to cooperate to identify deviations between the mitigation measures proposed and the project as implemented and to determine what actions should be taken to alleviate the adverse environmental impacts caused thereby.

[1] *See* International Boundary and Water Commission, *Final Environmental Impact Statement, Rio Grande Boundary Preservation Between Port Quitman and Haciendita* (1978).

3. *Central Connecticut Expressway* (Connecticut): In a 1980 addendum to the final EIS on this project, the Connecticut Department of Transportation made a commitment to minimize wetland impacts and to retain ownership of certain wetlands within the highway right-of-way.[2] Some of the wetland sites have been sold for development, others have been filled and, in general, mitigation has failed.[3]

4. *Spinney Mountain Reservoir* (Colorado): In the EIS on this project, the City of Aurora, Colorado, promised to acquire and dedicate areas along the South Platte River for public fishing rights in order to mitigate the loss of fishing access that would result from impoundment of the river.[4] Although the city agreed to carry out this commitment prior to impoundment,[5] it has yet to provide any access for fishing on the river.[6]

[2] U.S. Dep't of Transportation, *Final Environmental Impact Statement for Central Connecticut Expressway*, pages I-84 to I-91, 77-04-F, *Addendum* (1980).

[3] Letter from Gordon E. Beckett, U.S. Fish and Wildlife Service, to William Lawless, U.S. Army Corps of Engineers (March 19, 1986); letter from David A. Fierra, U.S. Environmental Protection Agency, to William Lawless, U.S. Army Corps of Engineers (May 5, 1988) (both letters on file at National Wildlife Federation Clinic, Boulder, CO.)

[4] U.S. Dep't of the Army, Corps of Engineers, *Final Environmental Impact Statement for Regulatory Permits for the Spinney Mountain Reservoir Water Supply Project*, App. F at 6 (1980).

[5] *Id.*

[6] Letter from Bruce Goforth, Colorado Division of Wildlife, to Elden Strine, U.S. Army Corps of Engineers (August 10, 1988) (on file at National Wildlife Federation Clinic, Boulder, CO).

5. *BLM Oil and Gas Leases* (Colorado): EISs prepared by the Bureau of Land Management ("BLM") on its land use plans as well as the plans themselves call for the use of lease stipulations to mitigate the adverse impacts of oil and gas leasing and development on resources such as endangered species, vegetation, and wild horses.[7] The State Director for BLM in Colorado recently acknowledged that, in many cases, the agency issues leases without the required stipulations.[8]

Example of successful mitigation analysis

6. *Rock Creek/Muddy Creek Reservoir EIS* (Colorado): In its EIS on two potential water storage sites in Colorado,[9] the Forest Service evaluated the effectiveness of proposed mitigation measures. For example, as part of its approach to mitigating the loss of wetland habitat, the agency discussed mitigation options in terms of their practicality and potential effectiveness.[10] It identified areas where the proposed measures could be implemented, and

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7 See, e.g., U.S. Dep't of the Interior, Bureau of Land Management, Colorado, *Proposed Resource Management Plan and Final Environmental Impact Statement for the Kremmling Resource Area* at 107 (1984); U.S. Dep't of the Interior, Bureau of Land Management, *Record of Decision, Kremmling Resource Management Plan and Environmental Impact Statement* (December 1984).

8 Instruction Memorandum from State Director, Colorado, to District Managers and Deputy State Directors, Operations, Mineral Resources, and Lands and Renewable Resources (June 7, 1988).

9 U.S. Dep't of Agriculture, U.S. Forest Service, *Rock Creek-Muddy Creek Draft Environmental Impact Statement* (1987).

10 See *id.* at 4-46, 4-115 to 4-116, 5-1 to 5-2.

selected sites from among those areas where mitigation would be most effective.[11] It also detailed the specific measures to be used, assessed costs and identified who would bear them, and described the results of their implementation.[12]

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11 See, e.g., *id.* at 5-2, 5-9 to 5-10.

12 See, e.g., *id.* at 5-7 to 5-13.